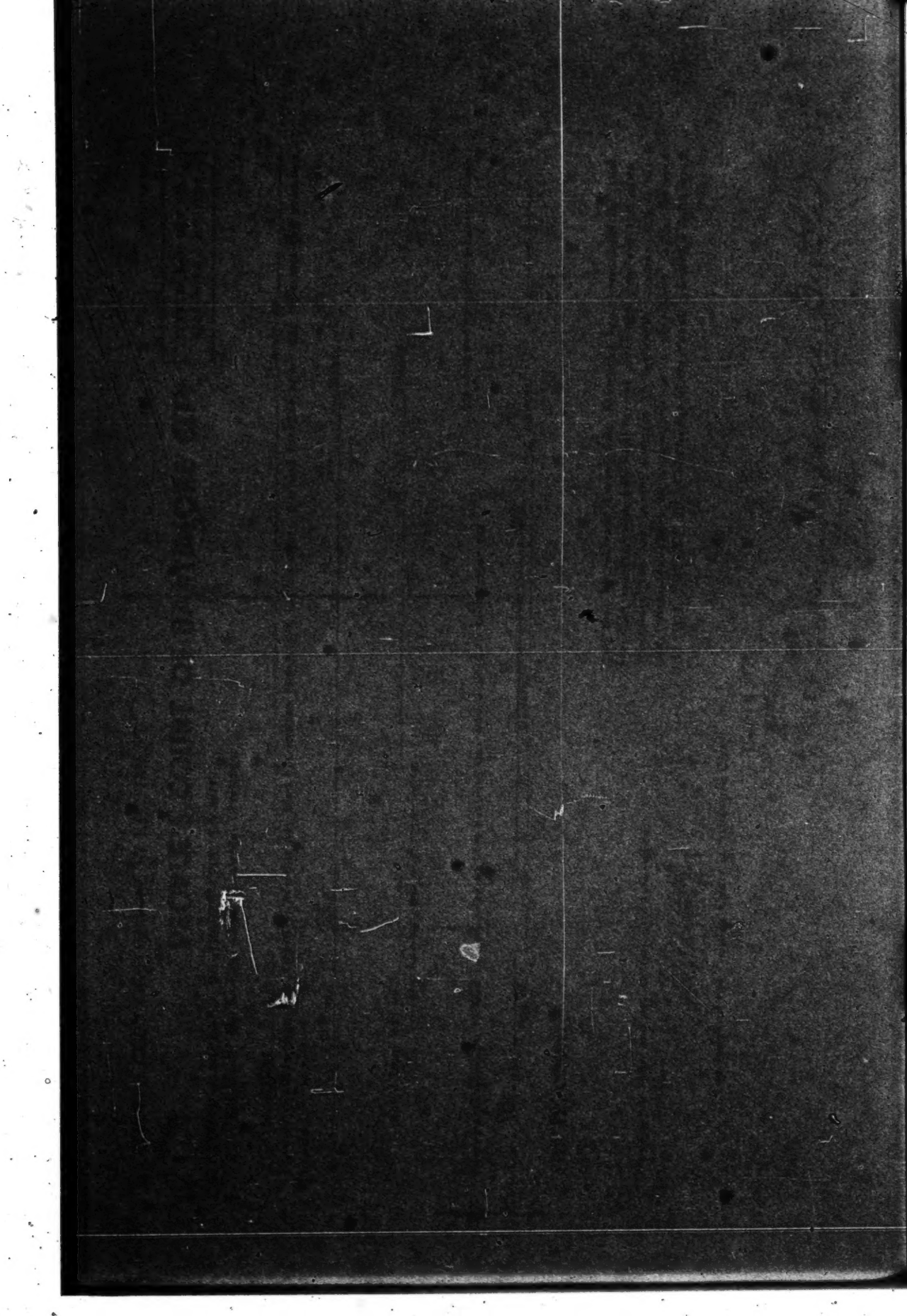

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SUPREME COURT, U.S.
Supreme Court, U.S.
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IN THE

Supreme Court of the United States

No. 70-5045

DONALD and EDNA LINDSEY, and All Other Persons Similarly Situated, *Appellants*,

v.

DOROTHEA M. NORMET, THE HONORABLE WILLIAM C. BEERS, In His Capacity as Judge of the District Court of the State of Oregon for the County of Multnomah; and ALL PERSONS SIMILARLY SITUATED HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

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IN THE

Supreme Court of the United States

No. 70-5045

DONALD and EDNA LINDSEY, and All Other Persons Similarly Situated, *Appellants*,

v.

DOROTHEA M. NORMET, THE HONORABLE WILLIAM C. BEERS, In His Capacity as Judge of the District Court of the State of Oregon for the County of Multnomah; and ALL PERSONS SIMILARLY SITUATED HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the United States District Court for the District of Oregon, dated September 10, 1970, is unreported however is reproduced in the Appendix at 72-78.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1253, which authorized a direct appeal from a judgment by a three-judge district court denying an injunction restraining the enforcement of a state statute. The Court below consisted of three judges convened pursuant to 28 U.S.C. § 2281. *et seq.*, which refused to grant an injunction against Appellees. By their complaint, Appellants sought to enjoin Appellees from enforcing an Oregon

statute on the ground that such enforcement violated the equal protection and due process guarantees of the Fourteenth Amendment to the United States Constitution. The District Court's jurisdiction was invoked pursuant to 28 U.S.C. §§ 1343, 2201, 2202 and 42 U.S.C. § 1983.

The District Court judgment was entered on September 10, 1970. Appellants' notice of appeal was filed September 14, 1970. The case was docketed in this Supreme Court at Misc. No. 6158 on November 12, 1970, at which time the Jurisdictional Statement was filed. Probable jurisdiction was noted on May 3, 1971, at which time permission was given to proceed *in forma pauperis*.

PROVISIONS OF THE UNITED STATES CONSTITUTION

First Amendment

> Freedom of religion, speech, and press; right to assemble and petition. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment

> When prosecution to be by presentment or indictment; double jeopardy; self-incrimination; due process; compensation for property taken for public use. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Ninth Amendment

Rights retained by people. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Tenth Amendment

Powers reserved to states or people. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Fourteenth Amendment

Section 1. Citizenship; privileges and immunities; due process; equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statute Involved

The state statute, the constitutionality of which is challenged is Oregon Rev. Stat. §§ 105.105, *et seq.* providing eviction procedure as follows:

FORCIBLE ENTRY AND WRONGFUL DETAINER

105.105 Entry to be lawful and peaceable only. No person shall enter upon any land, tenement or other real property unless the right of entry is given by law the entry shall be made in a peaceable manner and without force.

105.110 Action for forcible entry or wrongful detainer. When a forcible entry is made upon any

premises, or when an entry is made in a peaceable manner and possession is held by force, the person entitled to the premises may maintain in the county where the property is situated an action to recover the possession thereof in the circuit court, district court or before any justice of the peace of the county.

105.115 Cause of unlawful holding by force. The following are causes of unlawful holding by force within the meaning of ORS 105.110 and 105.125:

(1) When the tenant or person in possession of any premises fails or refuses to pay rent within 10 days after it is due under the lease or agreement under which he holds, or to deliver possession of the premises after being in default on payment of rent for 10 days.

(2) When the lease by its terms has expired and has not been renewed, or when the tenant or person in possession is holding from month, or year to year, and remains in possession after notice to quit as provided in ORS 105.120, or is holding contrary to any condition or covenant of the lease or is holding possession without any written lease or agreement.

105.120 Notice necessary to maintain action in certain cases; waiver of notice; effect of advance payments of rent. (1) An action for the recovery of the possession of the premises may be maintained in cases provided in subsection (2) of ORS 105.115, when the notice to terminate the tenancy or to quit has been served upon the tenant or person in possession in the manner prescribed by ORS 91.060 to 91.080 before the commencement of the action, unless the leasing or occupation is for the purpose of framing or agriculture, in which case such notice must be served for a period of 90 days before the commencement of the action.

(2) Any person entering into the possession of real estate under written lease as the tenant of

another may, but the terms of his lease, waive the giving of any notice required by this section.

(3) The service of a notice to quit upon a tenant or person in possession does not authorize an action to be maintained against him for the possession of the premises before the expiration of any period for which the tenant or person has paid the rent of the premises in advance.

105.125 Complaint. In an action pursuant to ORS 105.110 it is sufficient to state in the complaint:

(1) A description of the premises with convenient certainty;

(2) That the defendant is in possession of the premises;

(3) That he entered upon the premises with force or unlawfully holds the premises with force; and

(4) That the plaintiff is entitled to the possession of the premises.

105.130 How action conducted. Except as provided in ORS 105.135 to 105.160, an action pursuant to ORS 105.110 shall be conducted in all respects as other actions in courts of this state.

105.135 Service and return of summons. The summons shall be served and returned as in other actions. The service shall be not less than two or more than four days before the day of trial appointed by the court.

105.140 Continuance. No continuance shall be granted for a longer period than two days unless the defendant applying therefor gives an undertaking to the adverse party with good and sufficient security, to be approved by the court, conditioned for the payment of the rent that may accrue if judgment is rendered against the defendant.

105.145 Judgment on trial by court. If the action is tried by the court without a jury, and after hearing the evidence it concludes that the complaint

is not true, it shall enter judgment against the plaintiff for costs and disbursements. If the court finds the complaint true or if judgment is rendered by default, it shall render a general judgment against the defendant and in favor of the plaintiff, for restitution of the premises and the costs and disbursements of the action. If the court finds the complaint true in part, it shall render judgment for the restitution of such part only, and the costs and disbursements shall be taxed as the court deems just and equitable.

105.150 Verdict and judgment on trial by jury. If the action is tried by a jury and they find the complaint true, they shall render a general verdict of guilty against the defendant; if not true, they shall render a general verdict of not guilty; if true in part, they shall render a verdict setting forth the facts they find, and the court shall render judgment according to the verdict.

105.155 Form of execution. The execution, should judgment of restitution be rendered, may be in the following form:

STATE OF OREGON)
ss.
County of _____)

To the sheriff or any constable of the County:

Whereas, a certain action for the forcibly entry and detention, (or the forcible detention) of the following described premises, to wit: _____, lately tried before the above entitled court, wherein _____ was plaintiff and _____ was defendant, judgment was rendered on the ____ day of _____; A.D., ____, that the plaintiff _____ have restitution of the premises, and also that he recover the costs and disbursements in the sum of $_____;

In the name of the State of Oregon, you are, therefore, hereby commended to cause the defendant and his goods and chattels to be forthwith

removed from the premises and the plaintiff is to have restitution of the same. In the event the goods and chattels are not promptly removed thereafter by the defendant you are authorized and empowered to cause the same to be removed to a safe place for storage. You are also commanded to levy on the goods and chattels of the defendant, and make the costs and disbursements, aforesaid, and all accruing costs, and to amek legal service and due return of this writ.

Witness my hand and official seal (if issued out of a court of record) this ___day of _____, A.D., _____.

Justice of the Peace, or clerk of the district or circuit court.

105.160 Additional undertaking on appeal. If judgment is rendered against the defendant for the restitution of the real property described in the complaint, or any part thereof, no appeal shall be taken by the defendant from the judgment until he gives, by law upon appeal, an undertaking to the adverse party, with two sureties, who shall justify in like manner as bail upon arrest, for the payment to the plaintiff if the judgment is affirmed on appeal of twice the rental value of the real property of which restitution is adjudged from the commencement of the action in which the judgment was rendered until final judgment in the action.

QUESTIONS PRESENTED

1. Does the refusal of Oregon District Courts to hear and pass on the merits of affirmative defenses in F.E.D. actions deny appellants Equal Protection of the Laws?

2. Do Oregon Statutes requiring tenants in F.E.D. cases to prepare for trial in substantially less time than other defendants deny appellants Equal Protection of the Laws?

3. Do Oregon's restrictions on the rights of F.E.D. tenants to appeal deny appellants Equal Protection of the Laws?

4. Does Oregon's refusal to allow defendants in F.E.D. actions to raise affirmative defenses deny appellants Due Process of Law?

5. Does the Oregon statutory provision that enables an F.E.D. plaintiff to merely allege that the Defendant is "holding the premises by force" deny appellants Due Process of Law?

6. Does the Oregon statutory provision that requires an F.E.D. trial to be held within two to four days deny appellants Due Proces of Law?

7. Does the Oregon statutory provision that requires an F.E.D. defendant to post a double rent bond on appeal deny appellants Due Process of Law?

8. Does the Oregon F.E.D. procedure presenting a weighted unbalanced procedure in favor of the plaintiff deny appellants Due Process of Law?

STATEMENT OF THE CASE

Donald and Edna Lindsey represent a class of appellants including all those persons in the State of Oregon who are, have been or will be affected by the operation of Oregon's eviction law (called "forcible entry and wrongful detainer," or "F.E.D.") (A.33) Appellants as a class seek to remove the restraints imposed by Oregon's eviction law on tenants' abilities to properly defend themselves.

Appellants and the other plaintiffs in the action below are individuals who either were threatened with eviction or in fact had eviction proceedings instituted against them in the District Court of the State of Oregon for the County of Multnomah. Donald and Edna Lindsey were threatened with eviction (R. –Plaintiffs' Exhibit No. 14) allegedly because they withheld rent in an attempt to induce their

landlord appellee Normet, to repair their premises, which had been condemned by the Bureau of Building Inspection for the City of Portland, and in retaliation for their having reported code violations to the Bureau. (R. –Plaintiffs' Exhibit No. 3). Evarett Snyder was threatened with eviction under circumstances similar to the Lindseys, except that his dwelling was not condemned (A. 44-45, R. –Plaintiffs' Exhibits Nos. 15-23, 38-44 described A. 59, 61-62). Princess Thomas and Marie Dunne were threatened with eviction because they were welfare recipients (A. 49, R. –Plaintiffs' Exhibit No. 48). This action in Federal District Court was filed before F.E.D. actions could be filed in any of the above incidents.

F.E.D. actions were brought against plaintiffs Lowe and Oetting, and each attempted to raise certain affirmative defenses to their eviction action, including illegality of contract, violation of public policy, failure of consideration, constructive eviction, and unclean hands. (R. –Plaintiffs' Exhibits Nos. 1 and 2–answers filed in the State Court actions). In Oetting's eviction action, he attempted to raise these defenses through testimony at trial, but the trial judge sustained an objection by the landlord's attorney to the relevance of such testimony. (A. 50, Stip. fact No. 6). In Lowe's case, the landlord's attorney moved to strike these defenses on the ground that they were not permitted by the statute, and said motion was granted by appellee, the Honorable William C. Beers (R. –Plaintiffs' Exhibit No. 1, Motion and Order). In each of these cases, no hearing was held on the legal or factual merits of any of the defenses raised. Plaintiff Bonnie L. Colton was permitted to litigate affirmative defenses because of a stipulation between counsel and presents the sole exception to the otherwise consistent rulings of the judges of the District Court of the State of Oregon refusing to hear affirmative defenses in F.E.D. actions. (A. 50, Stip. fact nos. 7, 8; R. –Plaintiffs' Exhibit No. 47).

Appellant Lindsey's case is typical of that of other members of the class of appellants herein. Donald Lindsey resided in his home with his wife and three children. (A. 34) The condition of his home is readily evidenced by the color photographs thereof admitted into evidence. (R. –Plaintiffs' Exhibit Nos. 25-37, described A. 59-61; Transcript of Oral Argument at 50). An expert witness, Mrs. Josephine Brown, testified that "(i)n comparing it [Lindsey's residence] to other homes for low-income families, it's one of the worst I have seen that people are still living in." (R. –Plaintiffs' Exhibit No. 24 at 42). The Lindseys had been searching for a place to move for about two years but they were hindered by the fact that they did not have an automobile and by the low official vacancy rate of less than two percent with the more realistic figure of one percent actual availability. (R. –Plaintiffs' Exhibit No. 24 at 24-25). Donald Lindsey's physical condition, requiring him to spend considerable time in a wheel chair, further exacerbated his ability to search for housing (A. 34).

The substance of Mrs. Brown's testimony concerning low-income housing conditions and the types of irreparable harm caused to tenants being evicted is summarized in the Appendix at 67-70. Her deposition was admitted into evidence in this action along with all of Plaintiffs' Exhibits and is marked as Plaintiffs' Exhibit No. 24. (R. –Transcript of Oral Argument at 50).*

**E.g.* Excerpts from the deposition of Mrs. Josephine Brown, Plaintiffs' expert witness. R. - Pl. Ex. No. 24 at 42-44:

> Q. (By Mr. Clough) Okay. Assuming that the rental for this place [Lindsey residence] was one hundred dollars a month. Is this–how does this compare with the rental for other low-income rental units that you have observed?
>
> A. It's high for anything comparable.
>
> Q. Are you able to give an opinion, based on your knowledge and experience as to whether or not the Lindsey's would suffer irreparable harm if they were to be evicted from their dwelling?
>
> * * *
>
> (colloquy of counsel omitted)
>
> * * *

Oregon law is clear that the appellants have been or would have been denied the ability to raise any affirmative defense to any eviction action lodged against them.

Appellants and the other plaintiffs below filed a Civil Rights Action in the United States District Court for the District of Oregon seeking both declaratory and injustive relief, claiming that Oregon statutes violate their constitutional rights in the following particulars (A. 21-24):

(1) by not permitting the raising of affirmative defenses to an action for eviction,

(2) by not providing the tenant sufficient time in which to prepare for trial,

(3) by not requiring an F.E.D. complaint to furnish sufficient notice of the basis of the action to enable the tenant to properly defend;

THE DEPONENT: I think that it definitely would. It would be one more blow to them, and they've had a series of them.

If I might just interject in a general sense, that most low-income families have multiple problems, housing being only one of them. And anywhere along the line of these problems—there are many places along this line of these problems, they are continually buffetted and knocked into a downward spiral.

If they have bad health problems, they have more medical expenses; they lose jobs; they can't go to school—the children can't go to school. They get behind in their education.

It's—as I say, a continuing downward and tightening spiral which they find an emotional ego block to overcome. They give up hope. They have no reason for existence. But, besides that, there's the financial end of this. They just don't have money to pay for the cost of moving, if they also can't find other housing to which they can move.

Q. (By Mr. Clough) Would this reason also apply to—strike that.

If the persons who are in the category of low-income living—in low-income housing, would this same statement apply to them?

A. Yes.

Q. In general?

A. Yes, in general.

(4) by precluding recourse to an appeal, through the requirement of a double rent bond.

Joined as defendants were the landlords of the respective plaintiffs and the class of District Court judges in Oregon who carry out the challenged statutes. The Attorney General of Oregon was also served pursuant to 28 U.S.C. § 2284, but he did not appear.

The prayer for relief requested that the District Court declare the objectionable statutory procedures invalid and restrain their continued enforcement by issuing a permanent injunction against appellees.

A trial was held on the merits and judgment for the appellees was entered on September 10, 1970, and this appeal was taken.

SUMMARY OF ARGUMENT

Oregon's eviction statutes, ORS §§ 105.105 et. seq., deny tenant-defendants in Oregon both equal protection and due process of law, by depriving them of procedural rights and privileges afforded to other defendants in Oregon civil actions, and by denying them basic procedural rights needed to enable them to receive fundamentally fair hearings on their defenses. The specific provisions challenged include: (1) ORS §§ 105.110 - 105.150, which prohibit affirmative defenses, (2) ORS § 105.125, which permits the landlord to file a complaint giving inadequate notice of the basis of his claim, (3) ORS §§ 105.135 and 105.140, which require the tenant to go to trial within two to four days after receiving the summons, allowing a continuance beyond two days only if the tenant posts a "continuance bond," (4) ORS § 105.160, which permits an F.E.D. defendant to appeal only if he furnishes an undertaking, with security, for double the rental value of the premises.

In the equal protection argument, Appellants contend that there is no rational distinction between F.E.D. defend-

ants and other defendants justifying the harsh treatment of tenants, particularly since less drastic means are available to protect any legitimate purposes of the statutes. We also contend, however, that even if there were a minimally rational distinction, these statutes still deny Appellants equal protection, since a compelling governmental interest for the differing treatment must be shown, and this cannot be done. The compelling governmental interest test is applicable because these restrictions touch upon three fundamental interests of tenants: (1) a citizen's right to peaceful possession of his home, (2) his interest in obtaining decent shelter for himself and his family, and (3) his right to equal treatment in the courts in the dispensing of procedural rights and privileges.

In the due process argument, Appellants contend that the restrictions imposed by the Oregon statutes effectively prevent tenants from receiving a fair hearing on the merits of their defenses. This is contrary to a long line of cases of this Court guaranteeing the right of each citizen to access to the courts to litigate his claims and present his defenses. For the convenience of the Court, Appellants have prepared an Historical Background of the development of this right and have attached it to this brief as Appendix "A".

The District Court's decision erroneously sustained the constitutionality of the challenged F.E.D. statutes, and therefore its judgment for Appellees should be reversed.

ARGUMENT

I

OREGON'S IMPOSITION OF MORE ONEROUS RESTRICTIONS ON F.E.D. DEEENDANTS THAN ON OTHER DEFENDANTS IS NOT JUSTIFIABLE AND DENIES APPELLANTS EQUAL PROTECTION OF THE LAW.

A. The Applicable Test

This Court's method of deciding when a state is denying a class of litigants equal protection of the laws was succinctly summarized recently by the California Supreme Court in *Westbrook v. Mihaly*, 2 Cal.3d 765, 784-785, 471 P.2d 487 (1970):

> . . . [T]he United States Supreme Court has tended to employ a two-level test in reviewing legislative classifications under the equal protection clause. In the area of economic regulation, the high court has exercised restraint, investing legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose. (See *McDonald v. Board of Election* (1969) 394 U.S. 802, 809 [22 L.Ed.2d 739, 745-746, 89 S.Ct. 1404]; *McGowan v. Maryland* (1961) 366 U.S. 420, 425-426 [6 L.Ed.2d 393, 398-399, 81 S.Ct. 1101].)
>
> On the other hand, in cases involving "suspect classifications"[37] or touching on "fundamental interests,"[38] the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. (See *Shapiro v. Thompson, supra*, 394 U.S. 618, 638 [22 L.Ed.2d 600, 617]; *Sherbert v. Verner* (1963) 374 U.S. 398, 406 [10 L.Ed.2d 965, 971-972, 83 S.Ct. 1790]; *Skinner v. Oklahoma, supra*, 316 U.S. 535, 541 [86 L.Ed. 1655, 1660]; see also *Developments in the Law—Equal Protection* (1969) 82 Harv.L.Rev. 1064, 1120-1131.) Under the strict standard applied in such cases, the state

bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose. The dual aspect of this standard is clearly formulated in the opinion of Justice Marshall, dissenting, in *Hall v. Beals* (1969) 396 U.S. 45, 52 [24 L.Ed.2d 214, 220, 90 S.Ct. 200]: '. . . once a State has determined that a decision is to be made by popular vote, it may exclude persons from the franchise only upon a showing of compelling interest, and even then only when the exclusion is the least restrictive method of achieving the desired purpose. [Citations.]'

[37] Certain classifications, such as those based on race (*McLaughlin v. Florida* (1964) 379 U.S. 184 [13 L.Ed.2d 222, 85 S.Ct. 283]) or wealth (*Douglas v. California* (1963) 372 U.S. 353 [9 L.Ed.2d 811, 83 S.Ct. 814]), are "highly suspect" (*McDonald, supra,* at p. 807 [22 L.Ed.2d at p. 744]). 38

[38] Interests which have been identified as fundamental and therefore deserving of special treatment under the equal protection clause include procreation (*Skinner v. Oklahoma* (1942) 316 U.S. 535 [86 L.Ed. 1655, 62 S.Ct. 1110] and interstate travel (*Shapiro v. Thompson* (1969) 394 U.S. 618 [22 L.Ed.2d 600, 89 S.Ct. 1322]).

It is Appellant's contention that under either the "rational relationship" test or the "compelling state interest" test, Oregon's restrictions on tenants' abilities to properly defend FED actions must fall.

In *Shapiro v. Thompson,* 394 U.S. 618 (1969), the Court held that a state's one year's residency requirement for welfare benefits was irrational. Even though the Court went on to hold that the "compelling state interest" test applied because a fundamental interest (the right of interstate travel) was involved (*id.* at 634), the Court held that there was not even a "rational relationship" between the restriction and its alleged purpose of preventing the fraudulent

receipt of benefits," for less drastic means are available, and are employed, to minimize that hazard." *Id.* at 637, 638. Similarly, as will be pointed out, less drastic means are clearly available to the Oregon courts and legislature to protect the landlord from the hazards the restrictions were supposedly intended to prevent.

Appellants contend, however, that it is unnecessary to apply the "rational basis" test here, for the restrictions imposed on Oregon tenants touch on certain matters which have long been considered by our courts and legislative bodies to be fundamental interests. We contend that three separate and distinct fundamental interests are so affected: (1) a citizen's right to retain peaceful possession of his home, (2) his interest in obtaining decent shelter for himself and his family, and (3) his right to equal treatment in our courts in the dispensing of procedural rights and privileges. If any one of these interests is found to be fundamental, then the "compelling state interest" test must be applied. See also *"Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966).

1. *The Right to Retain Peaceful Possession of One's Home is a Fundamental Interest*

This Court has long recognized and protected the individual's right to peaceful possession of his home. While the several Justices have sometimes disagreed as to how to protect this right, all have agreed that this interest is fundamental.

In *Poe v. Ullman,* 367 U.S. 497 (1961), Mr. Justice Harlan dissented from the Court's refusal to strike down Connecticut's anti-contraceptive law, stating that:

> Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one

explicitly granted Constitutional right. [*Id.* at 551-552.]

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), Connecticut's anti-contraceptive law was declared unconstitutional, as it violated "the sanctity of a man's home and the privacies of life." *Id.* at 484. See also *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

Justices Goldberg, Warren, and Brennan concurred, citing and agreeing with the statement by Mr. Justice Harlan in *Poe v. Ullman, supra*. 381 U.S. at 495. Mr. Justice White also concurred, stating that when there was such a significant encrouchment on personal liberty, a compelling state interest must be shown. *Id.* at 504. Although Justices Black and Stewart dissented, they also expressed sentiments regarding the individual's interest in retaining possession of his property:

> But I think it belittles that Amendment [the Fourth] to talk about it as though it protects nothing but "privacy." To treat it that way is to give it a niggardly interpretation, not the kind of liberal reading I think any Bill of Rights provision should be given. The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. He simply wants his property left alone. [*Id.* at 509].

In *Frank v. Maryland*, 359 U.S. 360 (1959), the Court upheld a statute penalizing a homeowner for resisting an inspection by a city health inspector. In dissent, Justices Douglas, Warren, Black, and Brennan discussed extensively how important the protection of the home has been treated in Anglo-American law. Quoting from the elder Pitt, they stated:

> The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the train may enter—but the King

> of England cannot enter—all his force dares not cross the threshold of the ruined tenement. [*Id.* at 378-379]

The dissenters also quoted from James Otis:

> Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet he is as well guarded as a prince in his castle. [*Id.* at 479]

Frank was overruled in *Camara v. Municipal Court*, 387 U.S. 523 (1967). The majority opinion, written by Mr. Justice White, held that a warrant must be obtained before homes are inspected.

The Court's commitment to protecting the sanctity of the home was strongly demonstrated in *Silverman v. United States*, 365 U.S. 505 (1961), where police officers had gathered evidence by use of a "spike mike" which intruded several inches into the wall of defendant's house. Mr. Justice Stewart, writing for the majority, held the evidence inadmissible, as it was obtained by "an actual intrusion into a constitutionally protected area." *Id.* at 512. The Court expressly refused to decide the case on the ground that such eavesdropping violated a constitutionally protected right of a privacy, treating as more important "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Id.* at 511. *Cf. Rowan v. United States Post Office Department*, 397 U.S. 728, 736-738 (1970) (protection of home from private advertisers upheld).

The Court has not suggested that the interest of the householder in protecting his home is any less where he is renting than where he owns the dwelling in fee simple, and it is clear that such a distinction would have no reasonable basis. Such a distinction might remove more than one-third of our population from the protection of the cases discussed above. (The 1970 Census of Housing, Advance Report HCV 11, reports that out of a total of 68,631,428 housing units in the country, 23,554,976 are renter occupied.)

The tenant's interest in retaining possession has been recognized by courts across the country as being at least as important as the landlord's interest in protecting his investment. "The right to retain property already in possession is as sacred as the right to recover it, when dispossessed." *Mendoza v. Small Claims Court,* 49 Cal.2d 668, 672, 321 P.2d 9 (1958), quoting from *Hocking Valley Coal Co. v. Rosser,* 53 Ohio St. 12, 41 N.E. 263, 265 (1895). This right to retain possession of rented housing has been protected from: retaliation because the tenant reported code violations to a city agency (*Edwards v. Habib,* 397 F.2d 687 (D.C. Cir., 1968); *Dickhut v. Norton,* 173 N.W.2d 297 (Wis. 1970); *Portnoy v. Hill,* 294 N.Y.S.2d 278 (1968); Ill.Rev. Stat., ch. 80, § 71; N.J.Laws 1967, ch. 215; R.I.Gen.Laws Ann.§ 34-20-10; Mass. Laws Ann. ch. 186, § 18; Mich. Comp. Laws Ann. § 600.5646(4)(5); District of Columbia Housing Regulations, § 2910); retaliation because the tenant invoked a statutory "repair and deduct" remedy (*Schweiger v. Superior Court,* 3 Cal.3d 507, ___ P.2d. ___ (1970)); retaliation because the tenant engaged in tenant organizing (*Hosey v. Club Van Courtlandt,* 299 F. Supp. 501 (S.D.N.Y. 1969); *McQueen v. Druker,* 317 F. Supp. 1122, 1130 (D. Mass., 1970), affd., ___F.2d ___ (1st Cir., 1971)); eviction by a governmental agency without the opportunity for a prior hearing (*Escalera v. New York City Housing Authority,* 425 F.2d 853 (2nd Cir., 1970)); intrusion by the landlord to secure his "baggage lien" without a prior hearing (*Klim v. Jones,* 315 F. Supp. 109 (N.D. Cal. 1970); *Santiago v. McElroy,* 314 F. Supp. 284 (E.D. Pa., 1970); *Hall v. Garson,* 430 F.2d 430 (5th Cir., 1970); eviction before a full hearing on the merits of the landlord's claim and the tenant's defense (*Jordan v. Talbot,* 55 Cal.2d 597, 361 P.2d 20 (1961); *Mihans v. Municipal Court,* 7 Cal.App.3d 479, 87 Cal.Rptr. 17 (1970)); and eviction because of the tenant's race (*Abstract Investment Co. v. Hutchinson,* 204 Cal. App.2d 242, 22 Cal. Rptr. 309 (1962)). Recent cases have also recognized the rights of tenants to insist on certain guarantees provided by Congress before they may be dis-

placed from their homes by government programs. See *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2nd Cir., 1968); *Western Addition Community Organization v. Weaver*, 294 F. Supp 433 (N.D. Cal, 1968); *Powelton Civic Home Owners Ass'n: v. Department of Housing and Urban Development*, 284 F. Supp. 809 (E.D. Penna., 1968).

The householder's interest is not being permanently displaced from his home might well be considered more fundamental than his interest in preventing the sporadic intrusions dealt with by this Court in the cases discussed earlier. A noted commentator stated recently:

> If a house becomes a home only through its occupants' settling in and making it so, then a society's recognition of a "right to housing" must encompass some receptivity to claims not to be involuntarily removed from housing already occupied. Acknowledgement of such claims would reflect sensitivity to the severe inconvenience of moving, including the risk of not finding substitute housing of objectively comparable quality at comparable cost. It would also reflect sensitivity to the *trauma* of being uprooted—of being torn away from a structure, surroundings, and neighborhood with which one's existence may be interpenetrated in countless important ways. I shall, accordingly, refer to the idea of special claims to retain housing which one has as a "right not to be uprooted." [Michelman, *The Advent of a Right to Housing: A Current Appraisal*, 5 Harv. Civ. Rights-Civ. Lib. L. Rev. 207, 219 (1970)].

These authorities amply demonstrate that our courts and legislatures have historically treated the right of the individual householder to retain peaceful possession of his home as a fundamental interest.

2. *The Need for Decent Shelter is a Fundamental Interest*

In recent years, this Court, the Congress, and the Executive Department have all made pronouncements emphasizing the social necessity of decent housing for each resident of our country. Thus, all three branches of government have recognized the need for decent shelter as a fundamental interest.

In the U.S. Housing Act of 1937, § 1, Congress declared it:

> to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit . . . to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income in urban, rural nonfarm, and Indian areas that are injurious to the health, safety, and morals of the citizens of the Nation. [42 U.S.C. § 1401].

These goals were again asserted in the Housing Act of 1949, § 1.

> The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of *the goal of a decent home and a suitable living environment for every American family*, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation. [42 U.S.C. § 1441, emphasis added].

This goal was specifically reaffirmed by Congress in the Housing Act of 1968, together with the finding that the goal is not being reached, and that it can be substantially achieved within the next decade by the construction or

rehabilitation of 26 million housing units, 6 million of these for low- and moderate-income families. Similar findings and declarations were made by Congress in the Demonstration Cities and Metropolitan Development Act of 1966 (42 U.S.C. § 3301) and the Housing and Urban Development Act of 1968 (12 U.S.C. § 1701t).

The Executive Department has also recognized the fundamental interest in decent housing. In 1967, President Johnson described the "need . . . to provide the basic necessities of a decent home and healthy surroundings for every American family now imprisoned in the squalor of the slums" as "the most pressing unfulfilled need of our society." President's Committee on Urban Housing, Report (A Decent Home), 1. Just this year, the Secretary of the Department of Housing and Urban Development has also spoken of the national goal of providing "a decent home in a suitable living environment for every American family." New York Times, January 19, 1971, p. 49. See also President's Commission on Income Maintenance Programs, Background Papers, 337-349 (1970); Report of the National Advisory Commission on Civil Disorders 257,260 (1968).

This Court has also acknowledged the importance of decent housing on several occasions. In *Block v. Hirsh*, 256 U.S. 135 (1920), Mr. Justice Holmes, writing for the majority, stated that "Housing is a necessity of life." (*Id.* at 156). In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Court spoke of "the very means to subsist—food, shelter, and other necessaries of life." (*Id.* at 627). In *Reitman v Mulkey*, 387 U.S. 369 (1967); in his concurring opinion, Mr. Justice Douglas noted that "Urban housing is clearly marked with the public interest." (*Id.* at 385). See also *Hunter v. Erickson*, 393 U.S. 385 (1969); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

Other courts across the country have also recognized the need for decent housing, especially among low-income and minority people. Communities have been required to

lower restrictions on the construction of housing for low-income people and to plan for additional low-income housing. See *Appeal of Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970); *Southern Alameda Span. Sp. Org. v. City of Union City, Cal.*, 424 F.2d 291 (9th Cir., 1970); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 Stan. L. Rev. 767 (1969). Courts in several jurisdictions have recently imposed an implied warranty of habitability on the residential landlord, allowing the tenant remedies such as rent withholding and suits for damages where the warranty is substantially breached. See *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D. C. Cir., 1970) and other authorities cited in Section II B, *infra*.

The dismal effects of substandard housing on the morals and health of the occupants have been well documented. See, *e.g.*, Millsbough & Brechenfeld, *The Human Side of Urban Renewal*, IX (1960) ("[S]lums breed a hopelessness in people's hearts"); Report of the National Advisory Commission on Civil Disorders, 472 (Bantam Ed., 1968) ("open violation of [housing] codes [acts] as a constant source of distress to low-income tenents and creates serious hazards to health and safety in disadvantaged neighborhoods"); Weaver, *The Urban Complex* (1964); Fisher, *Lead Poisoning in Children*, 27 Journal of Housing, 71-75 (1970).

Thus, it has been recognized on every level that both the society at large and the resident in need have a fundamental interest in securing decent housing for each such resident.

3. *The Right to Equal Treatment In Our Courts Is a Fundamental Interest.*

The fundamental interest of a litigant in being permitted to properly defend himself in a civil lawsuit is clear. He needs adequate time to prepare his defense, the right to have his arguments heard, and the right to take available appeals to remedy improperties committed in the trial

court. Without these basic rights, the individual may be unjustly persecuted, and respect for the judicial system will quickly fade. Authorities supporting these rights are discussed extensively in the section of Appellant's brief dealing with the Due Process Clause, *infra*.

In addition, however, this Court and other courts have stressed on many occasions that a litigant not only has a fundamental interest in certain basic procedural rights in order to properly defend, he also has a fundamental interest in being afforded procedural *privileges* on an equal basis with other litigants who cannot reasonably be classified differently. "The Fourteenth Amendment . . . undoubtedly intended . . . that all persons . . . should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances, that no greater burdens should be laid upon one than are laid upon others in the same calling and condition . . . ." *Barbier v. Connolly*, 113 U.S. 27, 31 (1885) (dictum).

In *Truax v. Corrigan*, 257 U.S. 312 (1921), the Court dealt with an Arizona statute restricting employers' actions for injunctions against striking workers using illegal tactics, while there were no such restrictions on such injunction actions generally. The Court struck down the statute, even though it found that the employer had no fundamental right to the equity relief itself:

> "It is beside the point to say that plaintiffs had no vested right in equity relief, and that taking it away does not deprive them of due process of law. If, as is asserted, the granting of equitable remedies falls within the police power, and is a matter which the Legislature may vary as its judgment and discretion shall dictate, this does not meet the objection under the equality clause which forbids the granting of equitable relief to one man and the denying of

> it to another under like circumstances and in the same territorial jurisdiction. [*Id.* at 334]

In *Baxstrom v. Herold*, 383 U.S. 107 (1966), the Court reviewed New York statutes which guaranteed persons threatened with commitment to mental institutions the right to a jury trial on the issue of sanity and commitment to a civil hospital if found insane, but denied these rights to such persons nearing the end of a criminal sentence. The Court held this classification to be arbitrary and a denial of equal protection.

> The State, having made this substantial review proceeding generally available on this issue, may not, consistent with the Equal Protection clause of the Fourteenth Amendment, arbitrarily withhold it from some. [*Id.* at 111]

The Court made no finding that the rights to jury trial and civil commitment were themselves fundamental interests.

Similarly, in *Griffin v. Illinois*, 351 U.S. 12 (1956), the Court held that the State of Illinois could not deny an indigent dependent the right to appeal because he could not pay for a transcript, even though it also held that there was no constitutional right to appellate review. *Id.* at 18.

The fundamental importance of equality in procedural treatment of litigants was discussed by the Court in *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150 (1897), where the appellant challenged a state statute allowing attorneys' fees to successful plaintiffs who sued railroads, without allowing a corresponding privilege to victorious railroads, and without allowing such a privilege to plaintiffs suing non-railroad defendants. The Court stated:

> The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtor. They cannot appeal to the courts as other litigants under like conditions and with like protection. [*Id.* at 153].

In striking down the statutes, the Court held:

> No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure the equality of rights which is the foundation of free government. [*Id.* at 160]

Other courts have also insisted on strict equality of treatment of litigants in court. See, *e.g., Republic Pictures v. Kappler,* 151 F.2d 543, 547 (8th Cir., 1945) aff'd., 327 U.S. 757 (1946); *Hocking Valley Coal Co. v. Rosser,* 41 N.E. 263 (Ohio, 1893).

This fundamental interest in procedural equality is not only that of the particular litigant affected by the discrimination. It is also the fundamental interest of the judicial system itself to insist that litigants be treated equally in order to maintain the public's respect for the courts. This concern is reflected in the cases discussed above. See, *e.g., Gulf, Colorado & Santa Fe Ry. v. Ellis, supra,* 165 U.S. at 160.

These dual fundamental interests in procedural equality should require a showing of a compelling state interest before a classification depriving a class of litigants of certain procedural rights and privileges should be upheld.

B. *The Refusal Of Oregon District Courts To Hear And Pass On The Merits Of Affirmative Defenses In FED Actions Denies Appellants Equal Protection Of The Laws.*

Under ORS § 105.110, when possession of premises is unlawfully held by force, the person entitled to the premises may bring an action to recover possession in circuit court or district court. His complaint is deemed by ORS § 105.125 to be sufficient if it states (1) a description of the premises, (2) that defendant is in possession (3) that he entered with force or "unlawfully holds the premises with force," and (4) that plaintiff is entitled to possession. Under ORS § 105.115, the causes of "unlawful holding by force" are failure to pay rent or vacate within ten days

after rent is due, and termination of the tenancy by expiration of a fixed term, or service of a thirty-day notice in the case of a month-to-month tenancy. ORS §§ 105.145 and 105.150 provide that if the fact-finder concludes that the complaint is true, judgment shall be rendered for the plaintiff for restitution of the premises and costs.

Thus, these statutes on their face preclude the raising of any affirmative defenses. If the complaint alleges that the tenant failed to pay rent or vacate for tendays, or that he failed to move after expiration of the notice, and this is found to be true, the tenant is evicted. The fact that the tenant may have withheld rent because the landlord failed to perform his part of the bargain by making proper repairs, or the fact that a notice to terminate a month-to-month tenancy was served in retaliation for the tenant's having reported housing code violations to a city agency, are not only irrelevant, they are not even heard. These defenses are stricken.[1] (See complaint filed in this action, Appendix, pp. 24-26). Oregon has no similar ban on affirmative defenses applicable to civil actions in general. Appellants contend that the application of this ban only to tenants in FED actions denies them equal protection of the laws.

We emphasize that we are not here to challenge any decision of an Oregon court which rejects any of our proposal affirmative defenses on their merits, either legally or factually. We do, however, challenge the refusal of these courts to *hear* these defenses and decide them on their merits, just as they would do in any ordinary civil action.

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[1]Certain "equitable" defenses relating to title have been allowed in circuit court. *Hopka v. Forbes*, 135 Or. 91, 294 P.2d 342 (1930). Most FED cases, however, including the ones involved here, are brought in district court (pursuant to ORS § 46.060(1)(e)), which has a lower filing fee and less crowded docket. The district court jurisdictional statute appears to allow equitable defenses in district court FED actions also (see ORS § 46.060(2)), but this has not been construed to allow affirmative defenses generally.

To set aside any notion that this distinction is unimportant or that the proposed defenses are frivolous, however, we will briefly describe a few of these defenses in order to demonstrate that it is highly likely that one or more of them would be upheld, if heard.

One proposed defense asserts that because the landlord leased the premises with the contemplation that the premises would remain below the standards set by the city housing code, the lease or rental agreement is an *illegal, unenforceable contract*, on which no rent can be due, so that an FED action based upon non-payment of rent allegedly due under such a lease must fail. The Housing Code of Portland, Oregon, is typical of housing codes enacted by many communities throughout Oregon and the rest of the country.[2] Its purpose is to protect the life, health, and welfare of the general public and owners and occupants of residential buildings. (See Portland Housing Code, § 8-102, at Jurisdictional Statement, Appendix F, p. 18.) It sets out detailed requirements for maintenance and repair of property, and it forbids anyone to use or permit a building to be used in violation of its provisions. (See Portland Housing Code, § 8-204, at Jurisdictional Statement, Appendix F, p. 28.) If violations persist, the building may be ordered vacated and/or the offender may be prosecuted for a misdemeanor. (See Portland Housing Code, §§ 8-204,

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[2] As of five years ago, over 1,000 communities in the nation had enacted housing codes. Gribetz and Grad, Housing Code Enforcement: Sanctions and Remedies, 66 Colum. L. Rev. 1254, 1260, n. 19 (1966). The abysmal level of enforcement of these codes has been well documented and is now recognized as a problem of national concern. See Castrataro, *Housing Code Enforcement: A Century of Failure in New York City*, 14 N.Y.L.F. 60 (1968); Grad, *Legal Remedies for Housing Code Violations*, Research Report No. 14 to the National Commission on Urban Problems (1968); Note, *Enforcement of Municipal Housing Codes*, 78 Harv. L. Rev. 801 (1965).

8-1001, at Jurisdictional Statement, Appendix F, pp. 18-19).[3]

It seems clear that a lease agreement renting a dwelling in violation of the Housing Code[4] would be considered an illegal, unenforceable contract[5] under Oregon law, if only this defense were allowed to be asserted in a FED case.

The criteria for determining when a contract is illegal were set out by the Oregon Supreme Court in *Uhlmann v. Kin Daw*, 97 Or. 681, 193 Pac. 435, 437-438 (1920).

> An illegal agreement does not attain to the dignity of a contract, within the meaning of the term 'contract' as legally defined, because it is void, and therefore unenforceable. The agreement is an illegal one if the taint of illegality manifests itself in the consideration or in a promise expressed in the agreement, or in the purpose to which the agreement is applied. 13 C.J. 410. An agreement is illegal if it is contrary to law, morality, or public policy. 6 R. C. L. 693. Plain examples of illegality are found in agreements made in violation of some statute; and, stating the rule broadly, an agreement is illegal if it violates a statute or cannot be performed without violating a statute.
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[3]Like most housing codes, the Portland code fails to specify which maintenance and repair obligations fall on the landlord and which on the tenant. Nevertheless, since the obvious intent of such legislation is mainly to protect tenants, these codes have been interpreted to impose obligations on landlords where the defects were not wrongfully caused by tenants. See, *e.g.*, *McNally v. Ward*, 192 Cal. App.2d 871, 875, 877, 14 Cal. Rptr. 260 (1961); *Altz v. Lieberson*, 233 N.Y. 16, 19, 134 N.E. 703 (1922).

[4]The landlord's act of leasing out a substandard dwelling would be a violation of § 8-204, since he would be "permitting" the "use" or "occupancy" of the dwelling in violation of the code.

[5]A lease is treated as a contract under Oregon law. See *Wright v. Baumann*, 239 Or. 410, 398 P.2d 119, 121 (1965); *Eggen v. Wetterborg*, 193 Or. 145, 237 P.2d 970, 974 (1951); *Kuhn v. Coast to Stores*, 254 Or. 608, 461 P.2d 526, 527 (1969).

> The rule that an agreement is illegal and unenforceable if it conflicts with the provisions of a statute is not inexorable and unbending. If a statute having a penalty and a prohibition, express or implied, or only a penalty or only a prohibition, is silent and otherwise contains nothing from which the contrary is to be inferred, then an agreement which conflicts with the statute is void. However, upon finding a statute with either a penalty or a prohibition, or both, the court is not immediately debarred from further prosecution an inquiry as to whether an agreement is void and unenforceable in a court of justice.. *Harris v. Runnels*, 12 How. 79, 84, 13 L. Ed. 901. The inquiry is as to the legislative intent, and that may be ascertained, not only by an examination of the express terms of the statute, but it may also be implied from the several provisions of the enactment. Of course, if a statute expressly declares that an agreement made in contravention of it is void, then the inquiry is at an end; but, in the absence of such a declaration, the court may take the statute by its four corners and carefully consider the terms of the statute, its object, the evil it was enacted to remedy, and the effect of holding agreements in violation of it void, for the purpose of ascertaining whether it was the legislative intent to make such agreements void; and if from all these considerations it is manifest that the lawmakers had no such intention, the agreements should be held to be legal contracts and enforceable as such.

Under this test, it is apparent that where a contract cannot be performed without violating some Oregon statute which does not expressly declare such contracts to be valid in any event, the contract will be presumed to be void and unenforceable, such presumption to be overcome only by a showing that it is "manifest that the lawmakers had no such intention."[6] Oregon courts have followed the

[6]See also *Turney v. J. H. Tillman Co.*, 112 Or. 122, 228 Pac. 933, 935 (1924) ("It is only when the statute is silent, and contains nothing from which the contrary is to be inferred, that the contract is void.")

Uhlmann analysis and have voided contracts which were to be performed in violation of statute.[7]

Applying the *Uhlmann* test to the illegal renting of a substandard building, it seems clear that Oregon courts would hold such a lease agreement to be void. The Code imposes a prohibition and a penalty and is silent as to the enforceability of such leases, and there is nothing within the "four corners" of the Code to indicate that the "object" of the Code and the "evil it was enacted to remedy" would be adversely affected by not enforcing the contract. Indeed, refusing to enforce the contract should further the purpose of the Code: to induce landlords to properly maintain their property. The District of Columbia Court of Appeals ruled on this issue recently in *Brown v. Southhall Realty Company*, 237 A.2d 834 (D.C. Ct. App. 1968). Dealing with a housing code very similar to Portland's and an illegal contract doctrine very similar to *Uhlmann's*, the Court held the lease to be void and unenforceable. See also *Longenecker v. Hardin*, _____Ill.2d_____, 264 N.E.2d 878 (Ill. App. Ct., 1970). The tenant is therefore considered a tenant at will, and the landlord would have to serve a 30-day notice to terminate that tenancy. See *Diamond Housing Corp. v. Robinson*, 257 A.2d 492 (D.C. Ct. App., 1969).

A second proposed affirmative defense seeks to impose an "implied warranty of habitability" on the landlord.

In recent years, commentators have criticized courts for refusing to update feudal doctrines of *caveat emptor* to conform to the realities of the modern urban landlord-tenant relationship. See, *e.g.*, Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 Georgetown L. Rev. 519 (1966); Sax and Hiestand, *Slumlordism as a Tort*, 65

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[7]See *e.g.*, *Hunter v. Cunning*, 176 Or. 250, 154 P.2d 562 (1944), modified at 176 Or. 250, 157 P.2d 510 (1945) (contract made by unlicensed real estate broker is void); *Schramm v. Bank of California*, 143 Or. 546, 20 P.2d 1093, rehearing denied at 23 P.2d 327 (1933) (bank's pledge of assets for future debts, in violation of statute, is void).

Mich. L. Rev. 869 (1969); Quinn and Philips, *Law of Landlord-Tenant: Evolution of the Past and Guidelines for the Future*, 38 Fordham L. Rev. 225 (1969).

In response, courts in several jurisdictions have recently begun to impose an "implied warranty of habitability" on residential landlords, the standards of the warranty to be governed by local housing codes. See *Pines v. Perssion*, 14 Wis.2d 590, Ill N.W.2d 409 (1961); *Buckner v. Azulai*, 251 Cal. App. 2d Supp. 1013, 59 Cal. Rptr. 806 (1967); *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); *Lemle v. Breeden*, 462 P.2d 470 (Hawaii, 1969); *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir., 1970); *Sayko v. Bishop*, C.C.H. Pov. L. Rptr. ¶ 10,789 (N.Y. Dist. Ct., Nassau County, 1969); *Amanuensis, Ltd. v. Brown*, C.C.H. Pov. L. Rptr. ¶ 12,732 (N.Y. Civ. Ct., 1971); *Bonner v. Beechem*, C.C.H. Pov. L. Rptr. ¶ 11,098 (Colo. County Ct., Denver, 1970); *LeClair v. Woodward*, C.C.H. Pov. L. Rptr. ¶ 12,623 (Conn. Cir. Ct., 1970); Moskovitz, *Rent Withholding and the Implied Warranty of Habitability—Some New Breakthroughs*, 4 Clearinghouse Rev. 49 (1970).

In one of the leading cases in this field, *Javins v. First National Realty Corp., supra*, the tenant was permitted to raise the defense of breach of this implied warranty in a summary eviction action based on nonpayment of rent. The court protected the landlord from potential rent loss during litigation by compelling the tenant to pay the agreed rent into court monthly. If the tenant then proved a substantial breach of the warranty, he would not have to pay the agreed rent but only a "reasonable" rent, and thus defeat the eviction action.

A third affirmative defense asserts the doctrine of *retaliatory eviction*. Under this doctrine, where the landlord appears to properly invoke the eviction procedure but is in fact attempting to retaliate against the tenant for exercising some right protected by statute or the Constitution, the eviction cannot be allowed. This affirmative defense is now

permitted in several jurisdictions. See *Edwards v. Habib,* 397 F.2d 687 (D.C. Cir., 1968); *Dickhut v. Norton,* 173 N.W.2d 247 (Wis. 1970); *Portnoy v. Hill,* 294 N.Y.S.2d 278 (1968); *Hosey v. Club Van Cortlandt,* 299 F. Supp. 501 (S.D.N.Y. 1969); *McQueen v. Druker,* 317 F.Supp. 1122, 1130 (D. Mass., 1970), aff'd. ____ F.2d ____ (1st Cir., 1971); *Schweiger v. Superior Court,* 3 Cal.3d 507, ____P.2d ____ (1970); Moskovitz, *Retaliatory Eviction—A New Doctrine In California,* 46 Calif. State Bar J. 23 (1971).

Because the Oregon courts have refused to hear affirmative defenses in FED actions, there are presently no reported cases indicating whether or not these defenses are legally valid in Oregon.

Although the purpose of the Oregon courts in barring affirmative defenses such as these in FED cases has not been clearly articulated in any reported case, the apparent purpose of this exclusion can be discerned from the general purpose of the FED statutes: to permit the landlord to quickly recover possession of the premises in order to avoid loss of rental income during potentially lengthy litigation. See *L. B. Menefee Lumber Co. v. Abrams,* 138 Or. 263, 5 P.2d 709, 711-712 (1931); *Friedenthal v. Thompson,* 746 Or. 640, 31 P.2d 643, 645 (1934), In cases of alleged nonpayment of rent, the landlord fears that because the tenant has not paid demanded rent in the past, it is likely that he will be unable or unwilling to pay rent coming due while the case is being litigated. Until the case is concluded in the landlord's favor, he will be unable to rent the dwelling to someone else. Therefore, if the tenant is "judgment-proof," the longer the proceeding takes, the more rent the landlord stands to permanently lose. (It should be noted, however, that the restriction on defenses covers solvent tenants as well as insolvent tenants, and is thereby overinclusive and irrational.)

The Oregon legislature and courts have apparently found this purpose of protecting the landlord from potential loss to be more important than the tenant's need to present.

legitimate defenses allowed to all other defendants in Oregon civil cases. It is not necessary to question the merits of this choice to challenge the propriety of adopting such a drastic measure to effectuate that purpose. The Oregon courts have ignored possible means of protecting the landlord from potential loss during litigation *without* depriving the tenant of his right to a hearing on defenses which he should be permitted to raise. A method of resolving these conflicting interests was used in *Javins v. First National Realty Corporation, supra,* 428 F.2d 1071 (D.C. Cir., 1970). The court endorsed as "an excellent protective procedure" a requirement that the tenant raising defenses based upon code violations pay future rent into court as it becomes due. *Id.* at 1083, n. 67; *cf. Academy Spires, Inc. v. Jones,* 261 A.2d 413, 416 (N.J. Super. Ct., 1970). The court later elaborated on this procedure in *Bell v. Tsintolas Realty Company,* 430 F.2d 474 (D.C. Cir., 1970). Such a protective order may issue when the landlord, at a noticed hearing, shows need for such protection, in view of how long he has been deprived of rent, the landlord's obligations, and threats of foreclosure.

Use of such a protective order is not a novel idea. In fact, the continuance bond required by ORS § 105.140 is in effect such a protective order. In applying this provision to a tenant who requested a continuance in order to present certain "equitable" defenses in circuit court, the Oregon Supreme Court stated in *Friendenthal v. Thompson, supra,* that:

> Defendant should not object to paying the rent that accrues during the time the court permits him to remain in the premises by reason of the continuance of the action. The plaintiff should not be kept out of possession without, at least, such an assurance that the accruing rent will be paid if he wins his case. [31 P.2d at 646].

If affirmative defenses were allowed, the continuance bond requirement would probably be invoked in the majority of cases where such defenses were raised, since the tenant

would often need time to prepare for trial on this issue. (Where the tenant did not need a continuance, the court could still impose a protective order under its inherent powers, just as the court in *Javins* did.)

Because of the availability of the protective order, the blanket refusal of Oregon courts to hear affirmative defenses in FED cases only is wholly irrational, and this therefore denies tenants equal protection of the laws. Under the "rational relationship" test, this refusal does not pass muster, "for less drastic means are available, and are employed, to minimize that hazard" of rent loss to landlords during litigation of defenses which should not be denied to tenants. See *Shapiro v. Thompson*, 394 U.S. 618, 634, 637-638 (1969).

Appellants contend, however, that application of the "rational relationship" test is unnecessary. Oregon's refusal to listen to affirmative defenses in FED actions touches on all three fundamental interests discussed earlier: the right to retain possession of one's home, the need for decent shelter (insofar as certain defenses assert the landlord's failure to obey housing codes), and the interest of the tenant and the courts in equal procedural treatment for all litigants. Therefore, Oregon must show a compelling governmental interest for its restriction and that the distinctions drawn by the rule are necessary to further its purpose. See *Westbrook v. Mihaly, supra*, 2 Cal.3d 765, 784-785, 471 P.2d 487 (1970). We submit that neither requirement can be met here. Oregon can show no compelling governmental interest in preventing tenants, especially solvent tenants, from asserting their defenses, and, even if such an interest could be shown, that interest could be protected by less drastic means, so the distinction is not necessary to further the purpose of the rule.

C. *Oregon Statutes Requiring Tenants In FED Cases To Prepare For Trial In Substantially Less Time Than Other Defendants Denies Appellants Equal Protection Of the Laws.*

ORS § 15.040 allows a defendant in a civil action 10 days to file a written answer after the summons is served upon him. Once any desired discovery is completed, either party may then move to set the case for trial. The trial will take place anywhere from a few weeks to several months after the motion to set is filed, depending on how crowded the court docket is, whether a jury or court trial is requested, how long the trial is expected to take, etc. Thus, the defendant gets a minimum of several weeks to properly prepare for trial. If he desires a continuance to obtain even more time, he may obtain one on motion and for good cause shown. ORS § 17.050. The granting of the continuance may be conditional or unconditional, in the court's discretion. ORS § 17.050.

Oregon law is not so accommodating to the defendant in an FED action. ORS § 105.135 provides that service of the summons "shall be not less than two or more than four days before the day of trial appointed by the court." ORS § 105.140 allows a continuance of up to two days, but forbids a longer continuance at the request of the tenant unless the tenant gives an undertaking, with security covering "the rent that may accrue if judgment is rendered against the defendant." Under these provisions, the Oregon tenant is typically served with an FED summons on Friday, the trial having been set for Monday. If the tenant so requests, the court may in its discretion allow a one or two day continuance, setting trial for Tuesday or Wednesday. The court has discretion to grant a longer continuance only if the tenant posts his undertaking (with security in the form of cash, a corporate bond, or property) covering the amount of rent the landlord claims is owing plus any rent that may accrue before the trial can be completed. The low-income tenant who has his monthly paycheck carefully budgeted

might be able to post the rent claimed to be overdue (unless he has already paid it—in which case he will *still* have to post this security to raise the defense of payment), but it is unlikely that he will presently have the cash to post security for rent to come due later on.

The purpose of this different treatment of tenants by the Oregon legislature appears to be to protect landlords' from potential rent loss during litigation with tenants who might be insolvent or "judgment-proof." If so, the statute is arbitrarily overinclusive, since it impose these time restrictions on tenants who may not be insolvent, even though they presently do not have the extra cash to post the required security for a continuance beyond two days.

While some limitations on trial dates might be appropriate for tenants who *are* in fact insolvent, this would still not justify the outrageous time discrepancy involved here. Whereas the ordinary defendant has months to prepare his case, the typical tenant in an FED action is expected, *within one week at the most,* to perform the following tasks: find a lawyer, obtain an appointment, interview, and have the lawyer interview and subpoena witnesses, do legal research, prepare motions and other documents, and prepare for trial. While the refusal of Oregon courts to hear affirmative defenses may well limit the potential legal issues, the factual issues might still be quite complicated. If the action is brought for alleged nonpayment of rent, the issues might involve whether the rent was in fact paid or tendered, whether rent receipts are accurate, what rent was agreed to by oral agreement, was this agreement later modified, what day was the rent due (i.e., did the 10 days elapse before suit was filed), etc. If the action is brought after an alleged expiration of the term, the issues might involve what expiration date was agreed to, whether this was modified, whether a required notice of termination was served, etc. These issues require preparation, and the most diligent tenant and lawyer cannot be expected to properly deal with them in the time allowed by the Oregon statutes.

Later in this brief, we will present authorities showing that these restrictions go so far as to deny Appellants due process of law (regardless of how much time other defendants have to prepare for trial). At this point, we are contending that the restrictions are so unreasonable as to make the classification arbitrary and irrational, thereby denying Appellants equal protection vis-a-vis other defendants. While it might be reasonable to place insolvent tenants in a class requiring a time for trial preparation somewhat shorter than that applicable to defendants generally, it is not reasonable to place all tenants in a class which must prepare for trial within such a miniscule period. There is no rational relationship between the restrictions and their supposed purpose. Solvent tenants should be exempted from any restrictions, and "less drastic means" are available to protect the landlord from the loss of rent accruing during litigation with insolvent tenants. See *Shapiro v. Thompson*, 394 U.S. 618, 637-638 (1969). A limited but reasonable time period for trial preparation might be allowed, or protective orders (e.g., that future rent be paid into court as it comes due) might be issued. See *Javins v. First National Realty Corporation, supra*, 428 F.2d 1071, 1083, n. 67.

Again, however, we contend that it is unnecessary to apply the "rational relationship" test. Oregon's restrictions touch on two of the tenant's fundamental interests, his right to retain possession of his home and his (and the courts) interest in equal treatment for all litigants in procedural matters. Therefore, Oregon must show a compelling governmental interest in maintaining these restrictions and that they are necessary to further the purpose of the distinction. See *Westbrook v. Mihaly, supra*, 2 Cal. 3d 765, 784-785, 471 P.2d 487 (1970). No compelling governmental interest is present here. The State of Oregon has no compelling interest in forcing tenants to go to trial without adequate preparation, and, to the extent the state has an interest in protecting landlords from rent loss during litigation with insolvent tenants, this can be done by less drastic means. These harsh restrictions are not necessary.

D. Oregon's Restrictions On The Rights of FED Tenants To Appeal Denies Appellants Equal Protection of the Laws.

ORS § 19.040 provides that in order to appeal, the *ordinary litigant* in Oregon must file an undertaking, with one or more sureties, covering "all damages, costs, and disbursements which may be awarded against him on the appeal." In order for the appellant to obtain a stay of execution during the appeal, the undertaking must also provide: (1) if the judgment is for the recovery of money or personal property or the value thereof, that the appellant will satisfy it if he loses the appeal, (2) if the judgment is for the recovery of possession of real property, for a partition, or foreclosure of a lien thereon, that during his possession the appellant w will not commit waste and that if he loses the appeal he loses the appeal he will pay the value of the use of the property during the appeal.

ORS § 105.160 provides that if a *tenant in an FED action* wishes to appeal, he must give, "*in addition* to the undertaking now required by law upon appeal," an undertaking with *two* sureties for the payment of *twice* the rental value of the premises "from the commencement of the action in which the judgment is rendered until final judgment in the action."

Let us examine two defendants, each being sued in Oregon only for the recovery of his home. The first suit is based on foreclosure of an alleged lien. If this defendant loses on the trial court level and wishes to appeal, he must file an undertaking, with one surety, promising to pay any damages and costs which may be awarded against him on appeal. Since no damages were involved, this undertaking will be minimal. If he also wishes a stay of execution, his undertaking must also contain a promise not to commit waste and agree to pay the value of the premises during the appeal if he loses. This will probably amount to the rental value of the property during the likely length of time it will take for the appeal to be completed. Now let us look

at the second defendant. He is a tenant who lost a FED action on the trial level. In order to appeal and get a stay of execution, he must do everything the first defendant did. *In addition,* however, he must do the following: (1) find two sureties instead of one, (2) guarantee the rental value since the commencement of the action, not just during the appeal, and (3) guarantee *twice* that rental value, not just its amount.

While it would seem to be quite difficult to find any rational basis for this different treatment, the Oregon Supreme Court made the attempt in *Scales v. Spencer,* 246 Or. Ill, 424 P.2d 242 (1967):

> Inasmuch as a final judgment for restitution could not include a judgment for rent pending appeal it appears obvious that the legislative purpose for requiring this particular bond on appeal was to guarantee that the rent pending an appeal would be paid. That the bond must provide for double the rental value was, no doubt, intended to prevent frivolous appeals for the purpose of delay. If there were not some added cost or restriction every ousted tenant would appeal, regardless of the justification. It can also be assumed that the additional payment would compensate for waste or is in lien of damages for the unlawful holding over. Since there is a legitimate purpose for the classification made by the statute, its constitutional validity is secure. [*Id.* at 243].

These attributed purposes and their validity should be carefully examined. First, the court stated that the "obvious purpose" of this particular bond requirement is to guarantee that the rent would be paid during the appeal. The court overlooked the fact that the general appeal statute court overlooked the fact that the general appeal statute (ORS § 19.040(b)) already gives the landlord this protection, and it fails to explain why, to achieve this purpose, it is necessary to require the bond to cover rent "from the commencement of the action." Second, the court explains the double rent feature as intended to prevent frivolous

appeals, for if there were not "some added cost or restriction," every ousted tenant would appeal, regardless of justification. It maybe seriously questioned whether such a purpose (if in fact intended by the Legislature) would be a valid one. This Court has on several occasions stressed that determinations as to whether certain appeals are frivolous must be done on an individual basis, looking at the record in each case, rather than condoning the blanket type of penalty attributed by the Oregon court to the Oregon statute. See *Coppedge v. United States,* 369 U.S. 433, 446 (1962); *Ellis v. United States,* 356 U.S. 674, 675 (1958). Thirdly, the court assumed that the additional payment serves as compensation for the landlord for waste or damages. As for such waste or damages occurring during the appeal, the landlord is already protected by the undertaking the tenant must file (if he wants to remain in possession) under the general appeal statute, ORS § 19.040(b). As for possible waste or damage occurring earlier, allowing compensation through the mechanism of a double rent bond would clearly deny the tenant due process of law as to the extra amount. He may have committed no waste and caused no damage. Even if such waste or damage were alleged by the landlord, the tenant would have had no hearing on the truth of the allegations. Also, there is no conceivable rational relationship between a purpose of compensating *some* landlords for waste or damages and giving *every* landlord double rent, no more and no less.

For the moment, however, let us assume that the Oregon Supreme Court was correct in each of its statements. Does not each of these statements apply equally to the defendant whose lien was foreclosed? Should not he have to pay for the value of the premises during the appeal? Is not he just as likely or not likely to file a frivolous appeal? Is not he just as likely to have committed waste on the property? No rational distinction can be made between him and the FED defendant, none was suggested by the Oregon Supreme Court.

There is no rational basis for the special restrictions placed on the FED tenant's right to appeal by ORS § 105.160, and to the extent that the concerns expressed by the Oregon Supreme Court are legitimate and are not already covered by ORS § 19.040, they can be dealt with by "less drastic means." *Shapiro v. Thompson, supra,* 394 U.S. 618, 637-638 (1969). The court may penalize specific parties or attorneys who are found to have taken frivolous appeals. Landlords can be compensated for provable waste or damages in separate actions or hearings.

In any event, we contend here, as before, that it is unnecessary to apply the "rational relationship" test. Oregon's restrictions on the tenant's right to appeal touch on two fundamental interests, the tenant's right to retain peaceful possession of his home and his and the courts' interest in equal procedural treatment for all litigants. This restriction also involves a "suspect classification," one based upon wealth, since only relatively wealthy appellants can afford the security needed to post the double rent bond. See *McDonald v. Board of Election,* 394 U.S. 802, 809 (1969); *Harper v. Virginia State Board of Elections,* 383 U.S. 663 (1966); *Douglas v. California,* 372 U.S. 353 (1963). See also *Williams v. Shaffer,* 355 U.S. 1037 (1967) (Douglas, J., dissenting); *Lee v. Habib,* 424 F.2d 891 (D.C. Cir., 1970).[8] Therefore, the state must show a compelling state interest for the restrictions and that the distinction between FED tenants and other defendants makes the restrictions necessary. This cannot be done.

[8] *C.F. Also, Harmon v. Forsenius,* 380 U.S. 528 (1965) *Pasquarella v. Santos,* 416 F.2d 436 (1st Cir., 1969); *Lee v. Habib,* 424 F.2d 891 (D.C. Cir., 1970). For state court cases, *see e.g., Suber v. Suber,* 38 U.S.L.W. 2169 (N.J. Super, Ct., 1969); *Jeffreys v. Jeffreys,* 296 N.Y.S. 2d 74 (Sup. Ct., 1968); *O'Connor v. Matzdorff* 458 P.2d 154 (Wash., 1969); *Munkelwitz v. Hennepin Co. Welfare,* 159 N.W. 2d 402 (Minn., 1968); *Chambers v. Dist. Ct. of Dubuque Cty.,* 152 N.W. 2d 818 (Iowa, 1967). *See generally,* T. Willging, "Financial Barriers and Access of Indigents to the Courts," 57 Georgetown L.J. 253, 270 (1968); *Developments in the Law–Equal Protection,* 82 Harv. L. Rev. 1065 (1969).

II

OREGON'S RESTRICTIONS ON A TENANT'S ABILITY TO DEFEND AND APPEAL IN F.E.D. ACTIONS DENIES APPELLANTS DUE PROCESS OF LAW.

A. Recent Decisions of this Court establish that the right of effective access to the courts is protected by the Due Process Clause.

The issues of this appeal are broadly categorized as involving the right of access to the State Judicial structure to resolve disputes between the State's citizens *inter se.* The access question raises at least three distinct categories of potential constitutional infirmities each requiring independent consideration. Indigents may be denied access to the courts by the requirement of docket fees or the prepayment of costs. They may be deprived of access to the courts by the imposition of unreasonable continuance or appeal bonds. Lastly, they may be denied a meaningful forum where they may assert their claims for relief. This latter category by far the more subtle form of deprivation of meaningful access is not limited to indigents, and includes the denial or limitation of defenses, adequacy of time to prepare a defense, lack of a fair trial generally, and the deprivation of a single forum to raise their claim without being faced with the requirement of filing separate lawsuits to vindicate their rights.

Recent cases strongly suggest that this appeal is but another in a line of cases developing and clarifying procedural due process of law and its corresponding imposition of duties on the States, setting forth guidelines in the relationships of the States and their citizens and the State's citizens *inter se* when private disputes arise resulting in recourse to the State judicial structure. See *Sniadach v. Family Finance Co.*, 395 U.S. 337 (1969) (State provision of remedy of wage attachment without a prior hearing in debtor-creditor relationship held invalid.); *Goldberg v. Kelley*, 397 U.S. 254 (1970) (state Welfare Dept. held to

be required to provide fair hearings before terminating welfare grants); *Wisconsin v. Constantineau*, ____U.S.____, 39 U.S.L.W. 4128 (1971) (held, an individual has a right to a prior hearing before a State brands him a public drunk by posting notices in taverns); *Boddie v. Connecticut*, ____U.S. ____, 39 U.S.L.W. 4294 (1971) (held, State must provide free access to State courts by waiving filing fees in divorce cases if persons are indigent); *Bell v. Burson*, ____U.S.____, 39 U.S.L.W. 4607 (1971) (State provision to protect potential recovery in automobile accident negligence cases through requirement of posting evidence of financial responsibility held invalid without a hearing on likelihood of liability).

Each of these cases guarantees the fundamental right of meaningful access to the courts that is protected by the procedural due process safeguards of the Fifth and Fourteenth Amendments. *See generally* Brief Appendix "A", Section I.

The due process clause of the Fifth Amendment found its origins in chapter 29 of the Magna Charta, and has been described as "intend(ing) to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." *Bank of Columbia v. Okely*, 4 Wheat. 235, 244 (1819). The famous quotation of Daniel Webster in his argument in *Dartmouth College v. Woodward*, 4 Wheat. 518 (1819) clearly sets the context in which due process cases have been considered. See *e.g. Hovey v. Elliott*, 167 U.S. 409, 418 (1897).

> By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.

Dartmouth College Case, supra at 582. It is clear that the government has a duty to provide access to the courts and afford due process of law to its litigants. As summarized by John Marshall in *Marbury v. Madison*, 1 Cranch 137, 163 (1803):

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of the government is to afford that protection.

Quoting 3 Blackstone's Commentaries 23, he went on to say:

> . . . 'it is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.' *Ibid.*

Respect in and confidence of the courts are prerequisites for the success of our form of government. The courts' arbitration and enforcement of rights is the very foundation underlying whatever rights may be considered "valuable" in our society. See *Meltzer v. LeCraw*, ____U.S.____, 39 U.S.L.W. 3483 (Black, J., dissenting).

Generally "(t)he article [Fifth Amendment] is a restraint on the legislature, as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law', by its mere will." *Den v. Hoboken Land Co.*, 18 How. 272, 276 (1855). This imposes the highest degree of trust in the courts since it is for them to determine the independent considerations of due process of law. *Grannis v. Ordean*, 234 U.S. 385 (1914). In that determination they are "governed by the substance of things and not by mere form." *Simon v. Craft*, 182 U.S. 427, 436 (1901).

The long line of cases concerning service of process and adequacy of notice present a recurring theme of the protection of due process of law, that no person shall be condemned in his property without notice and opportunity to defend. See *e.g. Armstrong v. Manzo*, 380 U.S. 545 (1965); *Covey v. Town of Sommers*, 351 U.S. 141 (1956); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950).[9]

[9] *See also Milliken v. Meyer*, 311 U.S. 457 (1940); *Louisville Nashville R.R. Co. v. Schmidt*, 177 U.S. 230 (1900); *Iowa Central Ry Co. v. Iowa*, 160 U.S. 389 (1896); *Earle v. McVeigh*, 91 U.S. 503 (1876);

Although the foregoing list combines Fifth Amendment cases and Fourteenth Amendment cases, the considerations are identical. Generally *see Malloy v. Hogan*, 378 U.S. 1 (1964). The principles apply as well to administrative hearings,[10] and the analogy from criminal cases is clear.[11]

This court long ago settled the question that the right of all people to use the courts of a state is guaranteed by the privileges and immunities clause of the Fourteenth Amendment. *E.g. Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142 (1907).[12] In settling this question this Court has unequivocally stated that,

> The right to sue and defend in the Courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government. *It is one of the highest and most essential privileges of citizenship. . . . Chambers v. Balt. & Ohio R.R., supra* at 148. (Emphasis supplied.)

Implicit in the right to sue is the right to assert a competent and complete defense to a suit.

Notwithstanding the fact that issue characterization has led to the handling of some access questions in the language of privileges and immunities (see, *e.g., Chambers v. Baltimore & Ohio, supra*) or equal protection (see, *e.g., cf. Grif-*

Ray v. Norseworthy, 23 Wall. 128 (1875); *Galpin v. Page*, 18 Wall, 350 (1874); *Baldwin v. Hale*, 1 Wall. 223 (1863); *Boswell v. Otis*, 9 How. 336 (1850); *The Mary*, 9 Cranch 126 (1815).

[10] *Kelley v. Wyman*, 294 F. Supp. 893, affirmed *Goldberg v. Kelley*, 397 U.S. 254 (1970); *Willner v. Committee on Fitness*, 373 U.S. 96 (1963).

[11] *Cf. In re Gault*, 387 U.S. 1 (1967); *Gonzales v. United States*, 348 U.S. 407 (1955); *In re Oliver*, 333 U.S. 257 (1948); *Morgan v. United States*, 304 U.S. 1 (1938).

[12] *See also Blake v. McClung*, 172 U.S. 239 (1898); *Cole v. Cunningham*, 133 U.S. 107 (1890); *Ward v. Maryland*, 12 Wall. 418 (1871).

fin v. Illinois, 351 U.S. 12 (1956)), a fundamental due process right guarantees the result regardless of the semantics employed. *Cf. In re Gault, supra; In re Winship,* 396 U.S. 885 (1970).

It should be again emphasized that this appeal does not seek to have this Court determine the substantive rights of the parties. That is correctly the province of the state tribunals, however,

> . . . while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. *Postal Telegraph Cable Co. v. Newport,* 247 U.S. 464, 475-6.
>
> *Brinkerhoff-Faris Co. v. Hill,* 281 U.S. 673, 682 (1930).

The inescapable conclusion to be drawn from the foregoing is that due process requirements pervade all types of proceedings of a judicial nature regardless of the substantive law. It may be truly said that where procedural due process is concerned justice is not only blind but the scale she carries has two pans not one. Due process, therefore, determines what procedural safeguards are appropriate to protect the fundamental right of meaningful access to the civil courts in all types of litigation.

B. Oregon's refusal to allow defendants in F.E.D. to raise affirmative defenses denies appellants Due Process of Law.

It should be stressed at the outset that no affirmative defenses are heard by the Oregon Courts on the merits. Appellants do not seek to determine the merits of these potential defenses in this appeal. They merely assert that

they have the right to at least raise all potential defenses and have a hearing and argument on the merits in the state court structure.

Although the plaintiff in an eviction action may not recover back rent in that action, he may levy upon the goods of the tenant to recover the costs and disbursements of the suit.[13] Oregon Rev. Stat. § 105.155. If the tenant is unable to present all his defenses to an eviction action it will result not only in his being evicted but also in potential execution and sale of some of his property in violation of due process of law. *Sniadach v. Family Finance Co., supra; Bell v. Burson, supra.* The tenant's interest in the leasehold itself, of course, is also protected by the Due Process Clause. See discussion in Section I A (1).

The blanket denial of the ability to raise substantive and constitutional defenses *per se* is an unconstitutional deprivation of due process of law violative of the Fourteenth Amendment. The statute on its face preludes the raising of defenses other than technical ones. See discussion in Section I B., *supra.* Appellants contend that since the denial of ability to raise substantive and constitutional defenses is absolute by the language of the statute, it is an unconstitutional deprivation of due process of law. The long life of cases cited *supra* concerning service of process and adequacy of notice consistently reflect that there should be an opportunity to defend afforded to every defendant. It is the scope of that opportunity to defend that is at issue herein.

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[13] In Oregon a landlord may join a cause of action for the recovery of rent due, however, the causes are severed and the action for recovery of rent proceeds as any other lawsuit. *Compare* Oregon Rev. Stat. §§ 16.220 (1) (i), *and* 91.220. As a practical matter, however, once the tenant's property is in the hands of the landlord, the landlord could easily exercise his right of landlord's lien pursuant to Oregon Rev. Stat. § 87.535, et seq. These latter two points are not involved in this appeal but are mentioned solely to place the tenant's position in context.

> Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without having him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.
>
> *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876).

Due process requires that there be an opportunity to present every available defense. *American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932). *Cf. Poindexter v. Greenhow*, 114 U.S. 270, 294-295 (1885); *Osborn v. Bank of United States*, 9 Wheat. 738, 858 (1824).

Although this general rule may be qualified by procedural requirements, it presupposes that all defenses will, in fact be considered at trial or upon appellate review before any order becomes effective. *Opp Cotton Mills v. Dept. of Labor*, 312 U.S. 126, 153 (1941); *Consolidated Edison v. N.L.R.B.*, 305 U.S. 197, 234 (1938); *York v. Texas*, 137 U.S. 15, 20 (1890). See also *American Surety Co. v. Baldwin, supra.*[14]

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[14] *Cf. Bianchi v. Morales*, 262 U.S. 170 (1923); *Grant Timber & Mfg. Co. v. Gray*, 236 U.S. 133 (1915). These cases uphold state restrictions on the defendant's ability to question title in a possessory action. In *Grant Timber*, for example, plaintiff was in possession of timberland which defendant invaded. Plaintiff sued for possession and damages, and defendant attempted to contest plaintiff's title. The Court upheld the state's prohibition of this defense, as "The state is within its constitutional power when it limits the sphere of self help." (*Id.* at 135). We do not question this doctrine, but invoke it. The Oregon tenant takes possession with the landlord's consent and maintains it as his home. When the landlord wishes to evict, he merely brings an FED action. With its restrictions on the tenant's ability to defend, this action amounts to little more than self-help, with state sanction.

Appellants have not asserted any affirmative defense challenging the landlord's title and do not claim a constitutional right to do so.

Clearly the legislature may provide for summary procedures consistent with the principles of due process. *Sniadach v. Family Finance Co., supra.* See *Hurwitz v. North, supra* at 42. However, the right to a hearing is one of the " 'rudiments of fair play' " and such a fundamental right cannot be compromised on the grounds of convenience or expediency. *Ohio Bell Telegraph Co. v. P.U.C.*, 301 U.S. 292, 304-305 (1937).

1. *These Statutory Restrictions Unduly Invade the Province of the Judiciary*

In so providing summary procedures, the legislature cannot invade the province of the judiciary, since such invasion would violate the very essence of our system of government. *See Calder v. Bull*, 3 Dall. 386 (1798). *C.f. United States v. Yale Todd*, 14 L.Ed. 47 (1794) (not officially reported); *Hayburn's Case*, 2 Dall. 409 (1792); *United States v. Ferreira*, 13 How. 40 (1851). See generally Brief Appendix "A", Sections II, V. Appellants contend that a statute limiting and denying a defendant's ability to raise any substantive defenses invades the province of the judiciary. The Oregon statutory scheme clearly does this. The judiciary by its nature must be free to determine what is or is not a valid defense to an action for eviction upon due consideration of the law. The denial of this freedom to the judiciary presents a statute repugnant to the principles of the social compact theory upon which our government was founded. *See Calder v. Bull, supra; McVeigh v. U.S.*, 11 Wall. 259 (1871); *Windsor v. McVeigh*, 93 U.S. 274 (1876). See generally Brief Appendix "A", Section II.

Calder v. Bull, supra, answered an essentially due process question concerning a legislative grant of a new trial in a specific case. In *Calder* the Court did not specifically declare the statute in question unconstitutional since there was no necessity to do so; however, it was manifestly clear from the language of the opinion that if the facts had been different the statute would have been declared unconstitu-

tional as repugnant to the principles of social compact regarding the separation of powers and functions of the branches of the government.

This reasoning was subsequently recognized in the due process context in *McVeigh v. U.S., supra,* at 267, where the Court in a libel action held that the striking of the respondent's answer and denying him a hearing because he was an alien enemy (rebel in the Civil War) violated the just principles of the social compact citing *Calder v. Bull, supra.* This language in *McVeigh v. U.S., supra* at 267 was, in turn quoted in *Windsor v. McVeigh, supra* at 277 to answer a similar set of facts in a state court libel context for the confiscation of properties held by rebels. *Windsor v. McVeigh, supra,* in turn, was the lead citation for the basic due process proposition that a defendant has a right to be given a meaningful opportunity to be heard in *Boddie v. Connecticut, supra* at 4295. The due process safeguards, therefore, are directly traceable to the principles of social compact upon which our Constitution was founded. They protect appellants from a denial of the ability to raise defenses by the legislature (*cf. Poindexter v. Greenhow, supra*) or by the courts, (*Hovey v. Elliott, supra; Windsor v. McVeigh, supra*).

Analogous situations have arisen in the denial of ability to raise defenses to a cause of action because the defendant was a rebel, *Windsor v. McVeigh, supra; McVeigh v. U.S., supra* or in contempt of court, *Hovey v. Elliott, supra,* and in the confiscation cases where it was unsuccessfully asserted that the nature of the proceeding precluded the assertion of the defense of the President's pardon or anmesty of the owners. See *e.g., Armstrong's Foundry v. U.S.*, 6 Wall. 766 (1868); the *St. Louis Street Foundry v. U.S.*, 6 Wall. 770 (1868).[15]

[15] Analogy may also be drawn to the criminal cases involving possession of drugs or presence at stills to be sufficient to sustain a conviction for the crime charged. *E.g. United States v. Gainey,* 380 U.S. 63 (1965). See generally, *Turner v. United States,* 396 U.S. 398, 403-

2. *Preservation of the Supreme Court's Appellate Jurisdiction Requires That Defendants be Permitted to Raise Substantive Defenses*

The Supreme Court clearly has appellate jurisdiction to review constitutional claims litigated through the state court structure, such as the affirmative defense of retaliatory eviction. *See, e.g., Hosey v. Club Van Courtlandt*, 299 F. Supp. 501 (S.D. N.Y., 1969); *McQueen v. Druker*, 317 F. Supp. 1122 (D. Mass., 1970), aff'd. ____ F.2d. ____ (1st Cir., 1971); *Abstract Investment Co. v. Hutchinson*, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (1962). In order that these and similar issues may not be subverted; thereby frustrating this Court's appellate jurisdiction, a defendant has a right to present all of his potential defenses, making a record on

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405 (1970); *Leary v. United States*, 395 U.S. 6, 35-39 (1969). In *Gainey, supra*, this Court upheld the conviction of a person found in the presence of an illegal distillery operation. It was held that the statutory presumption was valid since it did not require the trial judge to charge the jury that the mere presence required conviction. *Gainey, supra* at 68-70. Justice Black's dissent *Gainey, supra* at 74, 79-80 went through the rationale used to determine the constitutional validity of such presumptions. First the presumption must have a rational connection between the inference drawn and the facts proved by relevant, competent evidence. Secondly, even if rationality is established, the presumption cannot operate to deprive the accused of a constitutional right. In *Gainey*, the majority opinion did not feel that the accused was denied a constitutional right.

In drawing this analogy it is important to note that in spite of the presumption, the trial judge was never required to direct a verdict based upon the presumption. In the instant appeal the trial judge is directed to enter judgment. Traditional to our system of justice is the ability to urge change in the law. Although appellants recognize that the legislature may declare or define the substantive rights of the parties, the legislature cannot lock in the procedure of the courts to prohibit the flexibility to argue change in the law in individual cases as they may arise. Otherwise such provisions would violate not only the principles of due process but also the First Amendment right to petition the court for redress of grievances. *See e.g. United Mine Workers v. Illinois State Bar Assoc.*, 389 U.S. 217 (1967).

the merits, for the purposes of appeal.[16] *General Oil Co. v. Crain*, 209 U.S. 211, 227-228 (1908). Appellants contend that to preserve the jurisdiction of this Court, state courts have an obligation to provide a meaningful forum for the resolution of disputes among its citizens *inter se*. See generally Brief Appendix "A", Sections V, VI.

The State courts have a concurrent duty to the people to provide a meaningful forum for the vindication of all their citizens' substantive rights. *Cf. Claflin v. Houseman*, 93 U.S. 130, 136-143 (1876); *Robb v. Connolly*, 111 U.S. 624, 636-639 (1884). For the forums to be meaningful they must incorporate the safeguards of due process of law.[17]

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[16] At a minimum the denial of ability to raise defenses asserting Constitutional safeguards is clearly a denial of due process. *E.g.*, racial discrimination, *Prendergast v. Snyder (Reitman v. Mulkey)*, 387 U.S. 369 (1967); *Shelley v. Kraemer*, 344 U.S. 1 (1948); *Abstract Investment Co. v. Hutchinson*, 204 Cal. App.2d 242, 22 Cal. Rptr. 309 (1962); exercise of first amendment rights, *Edwards v. Habib*, 397 F.2d 687 (CADC, 1968) (dictum). This proposition is consistent with the theory that the state courts have a concurrent obligation to protect and vindicate Constitutional rights with a corresponding duty to provide a meaningful forum.

[17] *See* and *compare Poindexter v. Greenhow, supra; and General Oil Co. v. Crain*, 209 U.S. 211, 227-228 (1908) (Supreme Court has power of review over Constitutional issues raised where statute attacked on its face or in manner of application. In order to demonstrate the constitutional infirmity, inquiries of fact best settled in an inferior tribunal may be necessary, reflecting the necessity for a meaningful forum in state court structures to resolve issues of fact to preserve appellate jurisdiction of Supreme Court.); *Ward v. Love County*, 253 U.S. 17, 22-23 (1920) (Supreme Court has the power to look to the substance of non-federal grounds upon which State Supreme Court bases its decision to determine whether or not they are tenable. If not, the Supreme Court may then proceed to resolve the Constitutional issues raised, thereby preserving their jurisdiction.); *Iowa-Des Moines Nat'l. Bank v. Bennett*, 284 U.S. 239, 246-247 (1931) (Supreme Court held that petitioners did not have obligation to sue the State to compel exaction of taxes equally if taxes were exacted on an unequal basis. It was held that they were not limited in their choice of forums, and could recover excess taxes in an affirm-

When a statute is constitutionally assaulted on its face, there may be the necessity of preservation of an adequate

ative suit, reversing the State Supreme Court decision that their only means of redress was an action to compel equal exaction of the tax assessed.). For the criminal analogy, *see* and *compare Ex parte Young*, 209 U.S. 123, 145-148 (1908) (Supreme Court sustained Federal jurisdiction to review State Statute. Statute held unconstitutional which, through imposition of stiff penalties, effectively denied appellants a hearing by indirection. State asserted alternative route of disobeying the law and appealing its validity in defensive posture.); *and Oklahoma Operating Co. v. Love*, 252 U.S. 331, 336-338 (1920) (A variation of *Ex Parte Young, supra.* Supreme Court noted subsequent change of law in the State to provide for appellate review of rate schedules to State Supreme Court. Supreme Court reversed and remanded the case for further consideration to provide a complete remedy since jurisdiction in the Federal courts in the first instance was established.); *and Reisman v. Caplin*, 375 U.S. 440, 450 (1964) (Supreme Court held that provisions for pre-contempt review of refusal of accountants to testify in federal tax enforcement proceedings were sufficient to obviate issues raised by appellants that their rights would be deprived as in *Ex Parte Young, supra* and *Oklahoma Operating Co. v. Love, supra.*) *Compare also* 28 U.S.C. § 2283; *Younger v. Harris*, _____ U.S. _____, 39 U.S.L.W. 4201 (1971) *and* the recent abstention cases of *Reetz v. Bozanich*, 397 U.S. 82 (1970); *Samuels v. Mackel*, _____ U.S. _____, 39 U.S.L.W. 4211 (1971). For example, 28 U.S.C. § 2283 and the doctrine of abstention presuppose that the State forum will be meaningfully adequate to frame and determine the issues. These vehicles to avoid Federal inquiry make little sense unless the duty to provide meaningful forum is clearly expressed as applying to the States. *Compare* also with the foregoing, the doctrine of exhaustion of state remedies which also "presupposes that some adequate state remedy exists" *Young v. Ragen*, 337 U.S. 235, 238-239 (1949), and the present statutory codification of the exhaustion doctrine in Federal Habeas Corpus relief. 28 U.S.C. § 2254(b) (Supp. II, 1966). The ever expanding list of special circumstances to obviate the exhaustion requirement argue strongly that the states must be advised of their duty to provide meaningful forums. *E.g. Ex parte Royall*, 117 U.S. 241 (1886); *Darr v. Buford*, 339 U.S. 200, 210 (1950); *In re Shuttlesworth*, 369 U.S. 35 (1962). Particular note should also be made of the purpose of 28 U.S.C. § 1651 which permits the Supreme Court to issue all writs necessary or appropriate in aid of its jurisdiction.

The logic of the doctrine of abstention traces its history in context with the effort to preserve the right to a jury trial. It was an extrapolation of the equity maxim that equity will not act when

and meaningful forum to ascertain the true state of the facts to place the constitutional issues in focus. When a statute or procedure is attacked as applied or when there is a claim of a subtle deprivation of a constitutional right, the necessity for a meaningful forum is absolute. The Supreme Court cannot, because of its volume of cases and limited manpower, become the trial court to establish the veracity of the facts in the first instance. The ability to develop a record from which an appeal may be taken is mandatory to preserve the Supreme Court's jurisdiction. This factor was noted in *General Oil Co. v. Crain, supra.* It would be perhaps desirable if that right could cleanly be applied to cases involving constitutional issues, however, such issues do not conveniently arise clearly at the inception of a lawsuit. They may not arise until the trial is well under way or the case is on appeal. Therefore, to cover all potential situations, the state courts necessarily must provide a meaningful forum for all substantive issues. The latter is analogous to *Love v. Ward Co.*, 253 U.S. 17, 22-23

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there is an adequate remedy at law. (This background was developed in the primary brief on the merits. Record at 66-82). In the Federal context, the adequate remedy at law may be in the state courts or in the Federal courts, hence the judge-made concept that the Federal courts will not act when there is an adequate remedy at state law. Sometimes abused and confused over the passage of time and obfuscated by the merger of law and equity, Abstention finds its true background in this underlying logic concerning preservation of the right to a jury trial. This same logic has equal application to the fraternal statutory concepts of the doctrine of exhaustion of state remedies, 28 U.S.C. § 2254(b), and the anti-injunction statute 28 U.S.C. §2283. The "anti-injunction" statute has been described as the legacy of our federalism. However, since our Forefathers considered the Federal Judiciary as the primary bastion of Federal Constitutional rights, the *only* way that this provision is justifiable as that "legacy" is if the states have a duty to provide a meaningful forum for the resolution of disputes. All three concepts presuppose that there will be a constitutionally adequate forum for the resolution of disputes within the state court structure, preserving thereby the appellate jurisdiction of the United States Supreme Court to review constitutional issues.

(1920), which demonstrates the extent to which the Supreme Court may go to preserve its jurisdiction. Clearly, if there is no trial record or no trial from which the facts may be ascertained, it would frustrate or at least seriously jeopardize this Court's appellate jurisdiction.

A comparison of the foregoing cases *inter se* indicates that a forum that is not fully competent by reason of statutory restrictions to adjudicate substantial Constitutional or substantive claims is constitutionally the same as no tribunal at all. Also *cf. Bell v. Burson;* ____U.S.____, 39 U.S.L.W. 4607 (1971); *Sniadach v. Family Finance Co., supra; Southern Ry Co. v. Virginia,* 290 U.S. 190 (1933); *Londoner v. Denver,* 210 U.S. 373 (1910). Indispensible to such a meaningful forum are the principles of due process of law. Therefore, appellants contend that the statutory language that denies them the opportunity to raise any substantive or constitutional defenses to an action for eviction is violative of the principles of due process of law. Such a denial also operates to fragmentize the state court action further encumbering the state's orderly administration of justice.

3. *Oregon's F.E.D. Procedure May Stigmatize Appellants in the Community*

State proceedings operating to place a stigma or badge of infamy upon its citizens require the observance of procedural due process of law prior to the time the person is labled as such. *Wisconsin v. Constantineau, supra* (public drunk); *Weiman v. Updegraff,* 344 U.S. 183 (1952) (loyalty oath regarding subversive organizations); *Joint Anti-Facist Committee v. McGrath,* 341 U.S. 123 (1951) (review of list communist organizations). An eviction in Oregon places a stigma on the tenant in the community. The Oregon Statute requires that the jury, if the cause is tried by a jury, find the defendant "guilty" or "not guilty." Oregon Rev. Stat. § 105.150. It furthermore describes the conduct as if equating it with the crime of trespass. *Compare* Oregon

Rev. Stat. § 105.105, *and* 164.460, *and* 164.462. If a person is to be stigmatized as having committed a crime, due process must be observed. *See Jenkins v. McKeithen,* 395 U.S. 411, 424-430 (1969). Mrs. Josephine Brown, the appellants' expert witness on low income housing, testified in her deposition concerning the matter as follows:

> Q. (By Mr. Clough): Have you talked to any families who have been or were about to be evicted from the dwellings in the low-income housing group?
> A. I have been—talked to people who have been evicted.
> Q. What is the fact [effect] of an eviction in general among low-income people?
> A. Well, there's many different facets to it. There is financial harm because they are living on—on the edge of nothing, anyway. They have to skimp to be able to pay their extra costs of moving and the item that they can skimp on the easiest is food. Then their health suffers. It's an emotional trauma.
>
> Parents are feeling less and less able to cope. *They lose standing in the community. They lose standing in their children's eyes. The children suffer the stigma from the children in the neighborhood* knowing that they are having to move out because they can't pay their bills, or something like this.
>
> Many times families can't find anything adequate, so they put up with something less adequate than they need. I know of one family that was evicted, a family of ten who was as late as last fall—still had not found housing that could keep them all under one roof. The children were split. [Emphasis supplied]

Surely the substantive effect of stigma in the community placed upon evicted tenants can require no less than the ability to assert all defenses possible to an action for eviction.

C. The Oregon Statutory Provision Found in Oregon Revised Statute § 105.125 (3) That Enables a Plaintiff in an Action for Eviction to Merely Allege That the Defendant is "Holding the Premises by Force" Without any Definition Thereof in the Complaint Violates the Due Process Clause of the Fourteenth Amendments to the United States Constitution.

Due process requires that adequate notice must be given of the grounds relied upon in the complaint so that the defendant may knowledgeably prepare his defense. Appellants contend that the permissible allegation of the complaint in an eviction action that the tenant is holding by "force" does not provide adequate notice of the grounds upon which the plaintiff is proceeding, thereby, not providing the tenant sufficient information to prepare a meaningful defense.

The landlord merely alleges that the tenant has "entered upon the premises with force or unlawfully holds the premises with force." Oregon Rev. Stat. § 105.125(3). The typical eviction action, whether based upon nonpayment of rent or holding after 30-day notice is given, involves the unlawful holding by force. The permissibly bald allegation that a tenant is holding by force leads to a misunderstanding of the nature of the action, since, for clarification of the terms, recourse must be made to Oregon Rev. Stat. § 105.115, to which no reference is made in the complaint. The tenant may, for example, understand that he faces a proceeding to evict him from his home, but he may not understand the ramifications of the terms used thinking he can easily defend the action himself since he is not holding the property by "force" in the everyday meaning of the word. This is important, because it may affect his judgment as to whether or not he should seek legal advice. Also, he has no notice of whether the basis of the landlord's claim is alleged nonpayment of rent, termination pursuant to an alleged 30 day notice, etc.

Therefore, Oregon Rev. Stat. § 105.125(3) is unconstitutional and void as violative of the principles of due process of law as guaranteed by the Fourteenth Amendments to the United States Constitution. See *Kelley v. Wyman, supra; Goldberg v. Kelley, supra; Sniadach v. Family Finance Co., supra; Willner v. Committee on Character and Fitness, supra; Greene v. McElroy,* 360 U.S. 474 (1959); *Armstrong v. Manzo, supra; Ohio Bell v. P.U.C., supra; State v. Jamison,* 251 Or. 114, 444 P.2d 15 (1968); *Board of Medical Examiners v. Buck,* 192 Or. 66, 232 P.2d 791 (1951) *Cf. Gonzales v. United States, supra; Morgan v. United States, supra.*

D. The Oregon Statutory Provisions Found in Oregon Revised Stat. § 105.135 That Provides a Mandatory Requirement That a Trial be Held Within Two to Four Days From the Date of Service of the Complaint Violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Due process also requires that the defendant must have sufficient time between service of notice and trial so that he may meaningfully prepare his defense. Appellants contend that the requirement that a hearing be held within two to four days as provided by Oregon Revised Stat. § 105.135 and the two day limitation on continuance without a bond as provided by Oregon Revised Stat. § 105.140 operate to deprive the tenant of sufficient time within which he may prepare a meaningful defense.

Once served with the summons, the tenant faces a "trial" within two to four days. Oregon Rev. Stat. § 105.135. Usually the landlord opts for the trial within two days and most hearings are so designated. If, as is frequently the case, the complaint is served late Friday afternoon, the hearing is scheduled for Monday afternoon. The end result is, of course, that the tenant is unable to seek the advice of counsel over the week-end, and in view of the difficulty of obtaining a lawyer in the morning to represent him in the

afternoon, he may attempt to defend the action himself or merely default. The majority of residential evictions are instituted in the District Court of the State of Oregon (Oregon Rev. Stat. § 46.060(e)) and the great majority of these are heard without counsel. The defendant is unable to get a continuance as a matter of right for greater than two days since he is limited by the provisions of Oregon Rev. Stat. § 105.140. The range of time that a defendant may get to prepare for trial is, therefore, four to six days, assuming, of course, that he is advised to request the continuance. Furthermore, the ability to prepare for trial is seriously encumbered since although discovery might be permitted as usually done in Oregon court action, the time constraints in an F.E.D. action render discovery a practical impossibility.

Therefore, Oregon Rev. Stat. §§ 105.135 and .105.140 are unconstitutional and void as violative of due process of law as guaranteed by the Fourteenth Amendments to the United States Constitution. See *Mullane v. Central Hanover Bank and Trust Co., supra; Armstrong v. Manzo, supra; Kelley v. Wyman, supra; Goldberg v. Kelley, supra; Milliken v. Meyer, supra; Ohio Bell v. P.U.C., supra; Hurwitz v. North,* 271 U.S. 40 (1926); *Roller v. Holly,* 176 U.S. 398 (1900); *Podolsky v. Devinney,* 281 F.Supp. 488 (S.D.N.Y., 1968); *Holland Furnace Co. v. Willis,* 149 S.E.2d 93 (Ga., 1966); *Bd. of Med. Exam. v. Buck, supra; Frederick v. Douglas Co.,* 176 Or. 54, 155 P.2d 925 (1945). *Cf. In re Gault, supra.*

E. The Oregon Statutory Provision Found in Oregon Revised Statute § 105.160 That Mandatorily Requires the Defendant to Post a Double Rent Bond on Appeal Violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The mandatory and arbitrary nature of the double rent bond on appeal as required by Oregon Rev. Stat. § 105.160 is attacked herein as violative of principles of due process of law. This provision was held to be constitutional by the Oregon Supreme Court. *Scales v. Spencer,* 246 Or. 111, 424

P.2d 242 (1967). If Oregon Rev. Stat. § 105.160 is declared unconstitutional, Oregon Rev. Stat. § 105.130 will still cause Oregon Rev. Stat. § 19.040 (1)(b) to be in effect which requires every appellant to furnish an undertaking adequately protecting the respondent during the pendency of the appeal. Furthermore, the trial judge will have opportunity to exercise his inherent discretion in a meaningful manner to preserve the interests of the parties pending appeal. Such discretion could include requiring payment of the rent into a court escrow account or some other variation thereof. *Generally, C.f.* Clough, "Pennsylvania's Rent Withholding Law", 73 Dick. L. Rev. 583 (1968-69); *National Council of the Junior Order of United American Mechanics v. Roberson,* 214 Pa. Super. 9, 248 A.2d 861 (1969); *Klein v. Allegheny County Health Dept.,* 441 Pa. 1, 269 A.2d 647 (1970); *DePaul v. Kauffman,* 441 Pa. 386, 272 A.2d 500 (1971). Also *C.f. Tate v. Short,* ____U.S.____, 39 U.S.L.W. 4301 (1971); *Williams v. Illinois,* 399 U.S. 235, 244-245 (1970). Therefore, appellants contend that no harm or disruption of litigation will result from declaring Oregon Rev. Stat. § 105.160 unconstitutional.

Due process requires that no impediments to access to the courts be imposed to prevent litigants from vindicating their rights. Appellants emphasize that they clearly recognize that bonds *per se* are constitutionally permissable to preserve the *status quo. Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949). Appellants do contend, however, that they must be reasonable to be consonant with due process principles.

If the tenant loses his trial (which he invariably does under the present statutory proceeding) his recourse is an appeal for a trial *de novo* before the Circuit Court of the State of Oregon. Oregon Rev. Stat. §§ 46.250 and 53.090. It should be emphasized here that the fact that the tenant is accorded a trial *de novo* on appeal to the Circuit Court does not avoid the other constitutional infirmaties raised in this appeal. On authority of Oregon Rev. Stat. §§ 105.105, *et seg.*, the Circuit Court refuses to hear affirmative defenses

and pursuant to Oregon Rev. Stat. § 105.135 sets the case for trial within the week. Immediately upon transfer of the papers to the Circuit Court clerk's desk the case is set for trial at the earliest time. The tenant in his trial *de novo* remains in the same posture as he was at the District Court level with the exception that he is in a court of record. In the ordinary course of events such a trial would be held within a week of the entry of judgment in the District Court. Therefore, the double rent bond on appeal is less an appellate bond than a precondition to a plenary trial. In order to obtain his trial *de novo* he is required to post a double rent bond on appeal as provided for by Oregon Rev. Stat. § 105.160. He is also required to pay the costs of the District Court or give security to them, however, as a practical matter these costs have been waived upon a showing of indigency in appropriate cases. However, the judges of the District Court and of the Circuit Court of the State of Oregon have consistently refused to alter the mandatory requirements of a double rent bond on appeal. Under present Oregon practice, there is no stay of execution unless the double rent bond is posted. The only way in which a tenant may pursue his appeal without fulfilling the requirement of a double rent bond on appeal is by vacating the premises pending the appeal. As a practical matter judgment rendered in the District Court is final in all residential eviction actions in Oregon.

As a general rule, there is no fundamental right to an appeal guaranteed by the Constitution. See *Griffin v. Illinois, supra.* However, the intent of the Framers indicate there is an exception to this general rule where the assertion of a denial of Constitutional rights is at issue. *See generally* brief Appendix "A", Section V. The investing of a concurrent ability to adjudicate Constitutional claims in the state courts would strongly suggest that there be a right of appeal or meaningful forum in those cases so that the jurisdiction of the Supreme Court may be preserved. By analogy, *see* and *compare* the cases providing Federal Habeas Corpus relief in a *post* trial situation where consti-

tutional grounds for relief are asserted: *E.g. Ex parte Hull*, 312 U.S. 546 (1941); *White v. Ragen, Warden*, 324 U.S. 869 (1945); *DeWitt v. Pail*, 366 F.2d 682 (9th Cir., 1966); *Stiltner v. Rhay*, 322 F.2d 314 (9th Cir., 1963); *Hatfield v. Bailleaux*, 290 F.2d 632 (9th Cir., 1961); [also *DeCicco v. Reed*, 222 N.E.2d 346 (Ill., 1966)] *with* the cases cited for comparison in the discussion under the section on state provision of meaningful forum, *supra*. See also *Rinaldi v. Yeager*, 384 U.S. 305 (1966).

The issue of raising Constitutional defenses and the subsequent ability to appeal them aside, the double rent bond on appeal under attack herein is an unreasonable impediment denying access to the court structure to vindicate substantial substantive rights. The operation of the appeal bond deprives the tenant from making a record from which he may appeal. When the action is brought in the State District Court he must appeal for a trial *de novo* in the State Circuit Court before he is in a position to have appellate review on a record and the law. *Compare* Oregon Rev. Stat. §§ 46.250 and 53.090. This *de facto* deprivation of ability to obtain a trial *de novo* is a denial of due process. *Cf. Hulett v. Julien*, 250 F. Supp. 208 (D. Ala., 1966). *Callan v. Wilson, Marshal*, 127 U.S. 540 (1888). *Hulett, supra*, held that a person did not have to submit to an unconstitutional trial to obtain a trial *de novo* on appeal and enjoined a magistrate who received his fees from costs assessed from so conducting the trial. *Callan, supra*, held that an individual charged with a crime had a right to a jury trial notwithstanding the fact that he would obtain a jury trial on appeal for a trial *de novo*. Appellants do not contend that the District Court trial is unconstitutional or that a record must be provided at that level. Appellants do contend that, in the spirit of *Hulett* and *Callan*, they have a due process right to appeal for their trial *de novo* and appeal to the Oregon Supreme Court, if necessary, without unreasonable impediments such as the arbitrary double rent bond on appeal under attack herein.

Appellants also contend that the arbitrary, mandatory requirement of a double rent bond on appeal invades the province of the judiciary in a manner similar to the deprivation of the ability to raise defenses. A trial judge who has heard the testimony in a case is in the best position to ascertain what type of bond will be sufficient to preserve the *status quo* and protect the parties while the case is pending appeal. *See* Oregon Rev. Stat. § 19.040(1)(b).

Since the operation of Oregon Rev. Stat. § 105.160 renders a *de facto* finish to litigation for an indigent, it is also violative of due process in that it deprives the defendant of his property without affording his due process of law. A tenant has a valuable property interest in his leasehold which is lost when he is evicted. See discussion in Section I A (1) Due Process, therefore, requires that he be permitted to appeal an adverse ruling without an unreasonable or arbitrary impediment such as a double rent bond.

F. The Oregon Statutory Scheme for Eviction Procedure as Found in Oregon Revised Statute §105.105, *Et Seq.* When Considered *In Toto*, Presents a Weighted and Unbalanced Procedure in Favor of the Landlord Thereby Violating the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Although the preceding discussion has dealt with the constitutional imfirmities of specific sections of Oregon's eviction law, Appellants emphasize here that the statute read as an integrated whole reveals a totally unbalanced procedure weighted in favor of the landlord. Once the landlord resorts to the State judicial machinery, assuming his technicalities are correct, he is virtually insured against loss of his judgment for restitution of the premises. Such a grossly unbalanced procedure cannot be permitted in our society, since it undermines respect for the Judicial system.

See Report of the National Advisory Commission on Civil Disorders, U.S. Gov't Printing Office 0-291-729 at 147 (1968). See also *Shelley v. Kraemer, supra.*

In his dissenting opinion in *Penn. R.R. Co. v. Day*, 360 U.S. 548, 554 (1959) Mr. Justice Black articulated the objections very well to the one-sided procedure under consideration therein. "Such an unequal procedure cannot be a fair trial since it gives one side a far better chance to win than the other. Analogous practices in both criminal and civil cases have been constantly struck down by this and many other courts." *Id.* at 562. Note particularly the examples given. *Id.* at 562, n. 14.[18] *See also Union Pacific R.R. Co. v. Price*, 360 U.S. 601, 621 (1959) (Justice Douglas' dissent). See also *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954). In *Penn R.R. Co. v. Day, supra*, Justice Black referred to the equal protection clause of the Fifth Amendment as support for his position that lopsided procedures should be stricken down. In arriving at this conclusion an analogy was drawn to *Bolling v. Sharpe, supra*, which handled a *Brown v. Board of Ed.*, 347 U.S. 483 (1954), situation in the federal context. The clear inference drawn from the

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[18]Note 14 in 360 U.S. *supra* at 562: "e.g., *Burns v. Ohio*, 360 U.S. 252, 3 L ed 2d 1209, 79 S. Ct. 1164 (state required to allow indigent defendant to appeal in forma pauperis from criminal conviction where appeal as of right allowed other defendants); *Griffin v. Illinois*, 351 U.S. 12, 100 L ed 891, 76 S. Ct. 585, 55 ALR2d 1055 (same); Spartanburg v. Cudd, 132 S.C. 264, 128 SE 360 (right to jury redetermination of administrative award in condemnation suit must be allowed municipality if permitted to property owner); Georgia Power Co. v. Brooks, 207 Ga 406, 62 SE2d 183 (statute allowing one party to a condemnation valuation suit to introduce evidence of "similar sales" while other party is not, held invalid); People v Sholem, 238 Ill 203, 87 NE 390 (appeal from administrative determination of valuation of an estate for tax purposes must be allowed State if allowed other party); Hecker v Illinois Cent. R. Co. 231 Ill 574, 83 NE 456 (statute providing for state supreme court review of facts after trial court's findings reversed without grant of new trial by intermediate appellate court, but denying such review if trial court's findings upheld, found invalid)."

foregoing is that there is an equal protection clause incorporated by inference in the Fifth Amendment requiring some procedural balance in treatment accorded classes of litigants as antagonists in the litigation context. This is presented as an alternative approach to handling the arbitrariness of the within statute.

It should be well noted that the courts are the sole arbiters to which recourse may be had for the resolution of disputes. It is the ability of resort to the courts that makes any bargaining process workable. Remove the possibility of meaningful recourse to the courts and a party in a bargaining situation is rendered helpless at the total mercy of the person with whom he is negotiating.

> We must recognize the fact that . . . critical changes have taken place economically and socially. Aware of such changes, we must realize further that most frequently today the average prospective tenant vis-a-vis the prospective landlord occupies a disadvantageous position. Stark necessity very often forces a tenant into occupancy of premises far from desirable and in a defective state of repair. The acute housing shortage mandates that the average prospective tenant accede to the demands of the prospective landlord as to conditions of rental, which, under ordinary conditions with housing available, the average tenant would not and should not accept.
>
> No longer does the average prospective tenant occupy a free bargaining status and no longer do the average landlord-to-be and tenant-to-be negotiate a lease on an 'arm's length' basis. Premises which, under normal circumstances, would be completely unattractive for rental are now, by necessity, at a premium. If our law is to keep in tune with our times we must recognize the present day inferior position of the average tenant vis-a-vis the landlord when it comes to negotiating a lease.
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> *Reitmeyer v. Sprecher*, 431 Pa. 284, 289, 243 A. 2d 395, 398 (1968).

To the same effect see *Javins v. First National Realty Corp.*, 428 F.2d 1071, 1079, review denied 400 U.S. 925 (1970); *Edwards v. Habib, supra* at 701.

If the tenant were not already at enough of a disadvantage under present economic and social conditions, the State of Oregon would have them bound and gagged before the courts as well. When this situation is exacerbated by poverty, the statutory scheme becomes a monstrosity.

The statute abridges and chills the appellants' First Amendment right to petition for redress of grievances. *United Mineworkers v. Illinois State Bar Assoc.*, 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963). *C.f., e.g., Ex Parte Young*, 209 U.S. 123, 145-148 (1908).

Where procedural due process is concerned outmoded statutes such as Oregon's F.E.D. law under attack herein cannot withstand the scruting of judicial fairness. *See Jones v. United States*, 362 U.S. 257, 266 (1960); *Funk v. United States*, 290 U.S. 371, 381-383 (1933). The irreparable harm caused by evictions of low income individuals such as appellants herein has been totally unrebutted by appellees. See Deposition of Mrs. Josephine Brown R. Plaintiff's Exhibit No. 24. "To sanction such a ruthless consequence, inevitably resulting from a" statute such as Oregon's eviction law "would justify a latter-day Anatole France to add one more item to his ironic comments on the 'majestic equality' of the law. 'The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.' (John Cournos, A Modern Plutarch, p. 27)" *Griffin v. Illinois*, 351 U.S. 12, 23 (1956) (Justice Frankfurter's concurring opinion).

Appellants herein seek only to be given a fair chance to assert their case before the State courts. The only way in which this may be accomplished is through the relief requested in this appeal.

CONCLUSION

The decision of the District Court upholding the constitutionality of Oregon's eviction statutes was erroneous, and its judgment in favor of Appellees should be reversed. The District Court should be instructed to:

1. Declare ORS § 105.115 - 105.150 unconstitutional insofar as they deny defendants in F.E.D. actions the right to raise affirmative defenses, and order Defendants Judges to hear and decide proposed affirmative defenses on their merits, issuing such reasonable protective orders as may be necessary to protect landlords from loss during litigation against insolvent tenants;

2. Declare ORS § 105.125 unconstitutional insofar as it fails to require plaintiffs in F.E.D. actions to allege with specificity the basis for the action, and order Defendants Judges to strike complaints not containing such specific allegations;

3. Declare ORS §§ 105.135 and 105.140 unconstitutional, and order Defendants Judges to apply to F.E.D. defendants only those statutes regarding trial settings and continuances which are applicable to defendants generally, and, where discretion is permitted by such statutes, to set trials as soon as necessary to protect landlords from loss during litigation with insolvent tenants, so long as no tenant is denied a reasonable time to prepare for trial;

4. Declare ORS § 105.160 unconstitutional, and order Defendant Judges to apply to tenants wishing to appeal

F.E.D. actions only those statutes applicable to civil appellants generally.

Respectfully submitted,

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APPENDIX "A"

This appendix is intended to be a supplement to the materials developed in the Argument concerning Procedural Due Process.

HISTORICAL BACKGROUND

I. INTRODUCTION

There are many threads of thought and manifestations thereof within American constitutional development which, when considered as an integrated whole, indicate conclusively that the people have a fundamental right of access to the courts protected by procedural due process safeguards.

Appellants contend that foundation for the right of meaningful access is found by necessary implication in the United States Constitution. The implementation of the court structure and the procedural safeguards of the Bill of Rights were memorialized in constitutional dogma whereas the fundamental right to have access to the courts was either assumed to be encompassed in the First Amendment or overlooked and left unmentioned. The conclusion, therefore, is that it was merely an oversight as being one of those principles that was so fundamental that the Framers of our Constitution did not think it necessary to include as a specific enumerated right. It is drawn from Alexander Hamilton's discussion in support of the omission of a Bill of Rights from the Constitution where he stated that:

> Here in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations. 'We, the people of the United States, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this Constitution for the United States of America.' Here is a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our States bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government.

The Federalist, No. 84, Mentor ed. (1961) at 513.

As reflected by the foregoing, there was considerable support for the proposition that a Bill of Rights was unnecessary in our Constitution because of its nature as a social compact of the people. It is clear, therefore, that the express declaration of the fundamental right of access was held to be unnecessary. And, it may have been further thought that the language of the First Amendment was intended to complete the logic. A similar anomaly can be found in the absence of a declaration of a fundamental right to bail in the Constitution. See Caleb Foote, "The Coming Constitutional Crisis on Bail," 113 U. of Pa. L.R. 959, 968, 984-989 (1965).

II. THE SOCIAL COMPACT

The expression of political thought in the Declaration of Independence, seasoned by the hard experience of the Confederation set the stage for the adoption of our constitution. The Framers were steeped in the teachings of the schools of natural law and natural rights.[1] These ideas were then embodied in our Constitution as a social compact of the people. Concisely stated "(t)he origin of government—that is to say, legitimate government—is a compact or contract among equal men, who pledge allegiance and obedience in return for protection of their natural rights and peace in harvesting the fruits of their labors. Sovereignty rests, if it rests anywhere at all, in the body of the whole people. The

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[1] At the time of the Federal Convention in 1787 "(t)he largest part of the intellectual baggage of the framers, whether of stars like Madison, Mason, and Wilson or of bitplayers like Richard Dobbs Spaight, Jared Ingersoll, and William Pierce, was a tempered version of the oldest and most famous of liberty-oriented political philosophers: the school of natural law and natural rights . . . finding its most persuasive exposition in the English language in John Locke's second treatise *Of Civil Government* (1690). . . ." Clinton Rossiter, "1787 The Grand Convention," Mentor ed. p. 51 (1966).

basis of government is therefore the consent of the governed. The most valid obligation to obey the law is self-obligation." Clinton Rossiter, "1787 The Grand Convention," Mentor ed. p. 53 (1966). See generally *Id.* at 52-55; Rossiter, "Seedtime of the Republic" (New York, 1953) particularly pp. 139-146, 326-499.

Concerning the type of issues joined in the instant appeal, the writings of John Locke are surprisingly relevant. John Locke described as a natural right that of a wronged individual to have reparation from the wrongdoer. John Locke, *Of Civil Government*, Chapter III, section 11 ["The English Philosophers," Modern Library Ed. (1939) at p. 407.] Such an individual in the state of nature "has a liberty to judge of or defend his right." Locke, *supra*, Chapter VII, Section 91 at 439. In our ordered society he surrenders this right to the Judiciary. *See also* Thomas Hobbes, "Leviathan" (1651), Ch. XVIII, Eighth point, "The English Philosophers," *supra* at 181. Meaningful access to the Judiciary is mandatory since even "(i)n absolute monarchies, indeed as well as other governments of the world, the subjects have an appeal to the law, and judges to decide any controversies and restrain any violence that may happen betwixt the subjects themselves, one amongst another. *See also* Hobbes "Leviathan," Chapter XV, *supra* at 171. This everyone thinks necessary, and believes he deserves to be thought a declared enemy to society and mankind who should go about to take it away." *Id.* (Section 93)

Locke postulates that the impetus for the preservation of this right or liberty is the desire on the part of the ruler or government to maintain an ordered productive society upon which he may draw as a recourse. However, the considerations of whether this is a right or a privilege in the American experiment are settled by a circular logic. Our government's power is found in the people. Since that is the case, their natural rights would be considered fundamental. There is no necessity to question whether this be a right or a privilege as may be done in other forms

of government, since it is already a right by the nature of our Constitution form of government. Here, Locke's basic premises are particularly expressed through the concept of due process of law.

The broad philosophical basis for our Constitution was reflected clearly in its Preamble.

> "We the People of the United States, in order to form a more perfect Union, establish Justice, . . . do ordain and establish this Constitution for the United States of America."

Not too surprisingly, the phrase "We the People" was specifically debated and discussed in at least three of the ratifying conventions.[2] Mr. Spencer of North Carolina concisely summarized this philosophical basis of the Constitution.

> "But in this case, in regard to the government which it is proposed we should adopt, there are no governors or rulers, we being the people who possess all power." 4 Elliot's Debates (2nd ed., 1863) at 12.

It is clear that the various officers and agents of the government exist for the promotion and protection of the welfare of the people. In Yates' Minutes of the Secret Debates

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[2] It was raised in Virginia by the rhetoric of Patrick Henry, 3 Elliot's Debates, (2nd ed., 1863) 22 as he advanced his "states' rights" theories of government. He was answered that the government belonged to the people by Governor Randolph, a member of the Federal Convention, *Id.* at 28, and Mr. Pendleton, *Id.* at 37. See also the statements of Mr. Lee, *Id.* at 42; and Mr. Corbin, *Id.* at 104.

In North Carolina, Mr. Iredell stated that "our government is founded on much nobler principles. The people are known with certainty to have originated it themselves. Those in power are their servants and agents; . . . . ," 4 Elliot's Debates, *supra* at 9. See also the statements of Mr. Goudy, *Id.* at 10; Mr. Caldwell, *Id.* at 15; Mr. Maclaine, *Id.* at 16, 24, 25; Mr. Iredell, *Id.* at 23; and Mr. Taylor, *Id.* at 23, 24.

In Pennsylvania, similar statements were made by Mr. Wilson, a member of the Federal Convention, 2 Elliot's Debates, supra at 434-435.

of the Federal Convention itself, Alexander Hamilton made it clear that,

> (t)here can be no truer principle than this—that every individual of the community at large has an equal right to the protection of the government. 1 Elliot's Debates, *supra* at 463.

The principles of natural law and the social compact theories were well recognized and supplied the basis for many legal theories subsequently determined by this Court. See *e.g. Calder v. Bull*, 3 Dall. 386, 388 (1798).[3]

III. THE NINTH AMENDMENT

Further reflection of this philosophical basis is found in the Ninth Amendment to the United States Constitution which provides that "(t)he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[4] Although it has been advanced that the Ninth Amendment is merely language to prevent the Bill of Rights from being interpreted as an exclusive list of rights,[5] it is, in reality, a reflection of the

[3] *See also e.g. Martin v. Hunter's Lessee*, 1 Wheat. 304, 324-325 (1816); *M'Culloch v. Maryland*, 4 Wheat. 316, 403-405 (1819); *United States v. Cruikshank*, 2 Otto 542, 549-550 (1875). See also *Marbury v. Madison*, 1 Cranch 137 (1803); *Luther v. Borden*, 7 How. 1 (1849).

[4] This Amendment and its corrolary, the Tenth are not excess verbiage and must be afforded meaning since "(i)t cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison, supra* at 174. See also *Myers v. United States*, 272 U.S. 52, 151 (1926). See generally, N. Redlich, "Are there Certain Rights *** Retained by the People?" 37 N.Y.U.L. Rev. 787 (1962); K.H. Kelsey, "The Ninth Amendment of the Federal Constitution," 11 Indiana L. J. 309 (1936).

[5] Justice Goldberg indicated in his concurring opinion in *Griswold v. Connecticut*, 381 U.S. 481, 490 (1965), that "(t)he(se) statement of Madison and Story (concerning the Ninth Amendment) make clear that the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people."

far broader philosophical basis for the very adoption of the Constitution, clearly stated in the Preamble.

Utilization of the Ninth Amendment to include rights reserved to the people by necessary implication is not a novel approach.[6] In the context of access to the courts, such a conclusion was approached by Justice Black in *Meltzer v. LeCraw*, ___ U.S. ___, 39 U.S.L.W. 3483 (1971).

> The decision in *Boddie v. Connecticut* can safely rest on only one crucial foundation—that *the civil courts of the United States and each of the States belong to the people* of this country and that no person can be denied access to those courts, either for a trial or an appeal . . . . (emphasis supplied)

IV. THE JUDICIARY AND ACCESS THERETO

The records of the Federal Convention and the subsequent ratifying conventions of the states, display a clear intent to preserve inviolate the peoples' access to the judiciary. Considerable debate was held over the propriety of establishing a federal judiciary as opposed to vesting the power in the existing state court structures.

The discussion concerning the establishment of the Supreme Court and its inferior tribunals reflected the consideration of the Framers concerning the judiciary in general. Mr. Spaight of North Carolina, a member of the Federal Convention, stated that the Framers wished that the Judiciary be established "to consult the ease and convenience of the people" and "to accommodate every citizen." 4 Elliot's Debates, *supra* at 139. In Virginia, similar intent was expressed by Mr. Madison, 3 Elliot's Debates, *supra* at 535, and Mr. Pendleton, *Id.* at 547. Mr. Maclaine of North

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[6] For example, it has been recognized that the right of a citizen to act as a party official or worker to further his own political views is of the nature of political rights reserved to the people by the Ninth and Tenth Amendments. *United Public Workers v. Mitchell*, 330 U.S. 75, 94-96 (1947).

Carolina supposed "that whatever courts there may be, they will be established according to the convenience of the people." 4 Elliot's Debates *supra* 139. So too with Governor Johnston of North Carolina, *Id.* at 141. It is clear from the tenor of the foregoing statements, albeit made in a context alluding to geographical access, that the utilization of the Judicial structure, state or federal was regarded as being open to the people for convenient access.

V. STRUCTURE OF THE JUDICIARY AND APPELLATE JURISDICTION

Great pains were taken to secure competence and impartiality in the Courts through appointment of the judiciary by the President with the advice and consent of the Congress, Article II, Section 2 of the United States Constitution; and by granting life terms and a non-diminishing compensation, Article III, Section 1, of the United States Constitution. See generally "The Federalist" Nos. 78-82 (Mentor ed., 1961) pp. 464-495. It should be noted, however, that Article III, Section 1 of the Constitution provides only that there shall be a Supreme Court with the provision of inferior tribunals left to the determination of Congress.

One of the constitutionally clearest of the Supreme Court's jurisdictional grants is its appellate jurisdiction found in Article III, Section 2 of the United States Constitution. Although an argument can be made that the inferior tribunals had original jurisdiction similarly granted to them on a general basis by the Constitution, their ability to entertain actions in the first instance is largely a creature of statute expanded by Congress in the 1870's. See *e.g.* Historical origins of 28 U.S.C. § 1342 (1875) and 42 U.S.C. § 1981, *et seq.* (1871). It should, therefore, be remembered that the Framers had appellate jurisdiction as one of the major considerations when they discussed the Federal Judiciary. *See e.g. United States v. Yale Todd,* 14 L.Ed. 47, 48 (1794) (Not officially reported).

Considerable discussion centered about the identity of the "inferior tribunals" and the propiety of appellate jurisdiction. The concern revolved about the utilization of existing state courts as the "inferior tribunals." The Framers opted for an independent federal judiciary to provide the bastion for the protection of Constitutional rights; however, they considered ". . . the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive that the State Courts would have a concurrent jurisdiction in all cases arising under the laws of the Union where it was not expressly prohibited." Hamilton, "The Federalist" No. 82, *supra* at 493. "The Courts of the latter (the States) will of course be natural auxiliaries to the execution of the laws of the Union. . . ." *Id.* at 494. See generally *Id.* at 491-495. The foregoing would certainly suggest that the States have a concurrent duty to provide meaningful access no less than that of the Federal government. *See Claflin v. Houseman*, 93 U.S. 130, 136-143 (1876); *Robb v. Connelly*, 111 U.S. 624, 636-639 (1884).

Alexander Hamilton further recognized that if the State tribunal were invested with the power of being the inferior tribunals to the Supreme Court "there would be a corresponding necessity for leaving the door of appeal as wide as possible." The Federalist No. 81, *supra* at 486. In the course of the debates in Virginia, the question was raised and discussed concerning the propriety of the appellate jurisdiction of the courts alluding to the potential prosecution of false appeals. James Madison's answer to that argument was simply and directly that "(t)he circulation of confidence (in the Courts) is better than the circulation of money." 3 Elliot's Debates, *supra* at 538. Since the issue of false or frivolous lawsuits and appeals is the most frequent argument against uninhibited access, it would seem that the absolute requirement of maintaining confidence in the courts far counterbalances the possibility of frivolous lawsuits and appeals in protecting open access to the judicial process.

In context, the foregoing suggests that there may be exceptions to the general rule that there is no right of appeal within state court judicial structures.

VI. DUTIES AND FUNCTIONS OF THE JUDICIARY

The duties and functions of the Courts include keeping the legislature within its limitations and interpreting the laws as individual disputes arise. See Alexander Hamilton's discussion in "The Federalist" No. 78, *supra* at 464. The duty however, does not stop there since,

> The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of *all subjects of litigation* between parties within its jurisdiction, though their causes of dispute are relative to the laws of the most distant part of the globe. (Emphasis supplied)
>
> Hamilton, "The Federalist," No. 82 *supra* at 493.

VII. FLEXIBILITY OF THE CONSTITUTION

Our Constitution should be placed in the additional context that it was written to last for "ages." For this to continue to be the case, the Constitution must maintain the flexibility for which it was designed. See discussion of Madison and Hamilton concerning tenure of office in Yate's Minutes of the Secret Debates of the Convention. 1 Elliot's Debates, *supra* at 449-451. Madison's comments concerning preservation of the power of the landed interests are particularly appropriate here, and we would do well to remember Hamilton's answer thereto: "The only distinction which remained at Rome was, at last, between the rich and poor." *Id.* at 450-451.

VIII. THE FIRST AMENDMENT

In connection with answering the right to access question the First Amendment is more than atmospherically relevant. The First Amendment, of course, provides a right of the people to "petition the Government for a redress of grievances." It is well settled that this provision of the First Amendment, is interpreted to include use of the Courts and that this provision is extended to the states through the Fourteenth Amendment. *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964); and *NAACP v. Button*, 371 U.S. 415 (1963). These cases conclude that the right to petition the courts includes the right to do so through counsel of their choice and this right may not be abridged by the states. If the people have the right to petition the courts through use of their chosen counsel, it seems illogical that the fundamental right to petition the courts for redress could be deprived by the denial of meaningful access. If the people are to have realistic fulfillment of this First Amendment right, it is clear that they must have viable access to that branch of the government that is designed to be the final arbitrator in private disputes as well as those with the government.